Supreme Court, U.S.
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90-1352

No. _____

In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*

Appellants,

v.

THE STATE OF TEXAS, *et al.*

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in characterizing submitted supplemental material as "not material" and therefore "precleared by operation of law" certain voting changes even though the United States Attorney General had found those changes objectionable under Section 5 of the Voting Rights Act.

2. Is preclearance required of certain voting procedures that were enacted by state statute prior to the effective date of Section 5 of the Voting Rights Act but that were first applied after the effective date of the Act and that the United States Attorney General opined should be precleared.

PARTIES

The parties in the court below are as follows:

Plaintiffs: The Mexican American Bar Association (MABA), The League of United Latin American Citizens (LULAC), LULAC Council #4434, LULAC Council #4451, Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Colins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, and Rev. James Thomas.

Defendants: The State of Texas, The Attorney General of the State of Texas, and The Secretary of State for the State of Texas.

Defendant Intervenors: Faith Johnson, Jerry Dellana, Paul R. Davis, Pete Perez, and William E. Burdock.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

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THE STATE OF TEXAS, *et al.*

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

JURISDICTIONAL STATEMENT

The appellants are Mexican American and Black voters in Texas, an organization of Mexican American Attorneys and a Mexican American public interest organization in Texas. They appeal from an order of the three-judge court of the United States District Court for the Western District of Texas dated December 26, 1990, refusing to enjoin the implementation of certain state court judgeships found to be objectionable by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. That same order refused to require defendants to submit certain other judgeships, even

though those judgeships became elected offices after the effective date of Section 5 of the Voting Rights Act, and the United States Attorney General determined that those judgeships should be submitted for preclearance.

OPINIONS BELOW

The 2-1 opinion and dissent of the three-judge district court dated December 26, 1990 is unpublished and is reproduced in the accompanying appendix, App. 1. This case was consolidated with *United States v. Texas et al.*, A-90-CA-1018 which was a case filed by the U.S. Government to enforce a letter of objection pursuant to Section 5 of the Voting Rights Act; the consolidation order is reproduced in the accompanying appendix, App. 41. The judgment of the court was entered on January 25, 1991 and is reproduced at App. 93.

JURISDICTION

The district court's order denying the requested injunctive relief was entered on December 26, 1990 and judgement was entered on January 25, 1991. A notice of appeal from the December 26 order was filed on January 7, 1991, App. 42, and amended on February 6, 1991, App. 95. This Court has jurisdiction of this appeal from the denial of injunctive relief by a three-judge district court under 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c; the text of this section is reproduced at App. 44.

STATEMENT OF THE CASE

INTRODUCTION

This case involves two Texas state statutes creating state district court judgeships: S.B. 1379 and S.B. 515. These two statutes involve different facts and legal issues and will be treated differently.

The Administrative Preclearance Process and S.B. 1379:

On June 14, 1989 the Governor of the State of Texas signed into law S.B. 1379 which created certain new state district court judgeships in numerous counties throughout Texas. App. 51. Eight months later[1], on February 13, 1990 Texas submitted for preclearance S.B. 1379, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. App. 47. On March 20, 1990, as part of the submission of S.B. 1379 and pursuant to discussions between Texas and the Department of Justice, Texas supplemented the submission with Sections 7 & 7a of Art. 5 of the Texas Constitution. A copy of the supplemental information is included at App. 59.

[1] At the trial Judge Bunton asked the attorneys for Texas why they had waited so long to submit S.B. 1379 and they stated that they had no explanation.

By letter dated April 11, 1990 the Department of Justice informed the State of Texas that it had received the supplemental information and that the new information was "necessary for a proper review of" S.B. 1379. It informed Texas that the new deadline for its review of S.B. 1379 was May 22, 1990. App. 68. The extension of the deadline is required by the administrative procedures for Section 5 of the Voting Rights Act, 28 C.F.R. 51.39[2]

By letter dated May 16, 1990, six days before the new May 22 deadline, Texas again supplemented the submission of S.B. 1379 as follows:

> "This letter is to request that you consider our submission of Senate Bill 1379 in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued." App. 70.[3]

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[2] 28 C.F.R. 51.39 provides: **Supplementary submission.** (a) When a submitting authority provides documents and written information materially supplementing a submission (or a request for reconsideration of an objection) for evaluation as if part of its original submission, or, before the expiration of the 60-day period, makes a second submission such that the two submissions cannot be independently considered, the 60-day period for the original submission will be calculated from the receipt of the supplementary information or from the second submission. (b) The Attorney General will notify the submitting authority when the 60-day period for a submission is recalculated from the receipt of supplementary information or from the receipt of a second related submission. (c) Notice of the receipt of supplementary information will be given to interested parties registered under § 51.32.

[3] *LULAC* is *LULAC v. Clements* 902 F.2d 293 (5th Cir. 1990).

By letter dated May 18, 1990 the Department of Justice made it clear that the deadline had again been extended:

> "It is our understanding pursuant to a discussion between Austin Bray, an attorney on your staff, and Sandra Colemann Deputy Chief of the Voting Section, that you request that the information you provided on May 15 and May 16, 1990, supplement your submission and that you understand that this will extend the time for review under Section 5. Accordingly, [the new deadline is July 16, 1990]. See procedures for the Administration of Section 5 (28 C.F.R. 51.39)." App. 72.

By letter dated July 2, 1990, 14 days before the new July 16 deadline, the State of Texas exercised it's right to withdraw the submission:

> "Pursuant to 28 C.F.R. § 51.25, this letter is to advise you that the State of Texas is hereby withdrawing its submission of Chapter 632, Senate Bill 1379, 71 Legislature, 1989. Our records indicate that you received this submission on February 13, 1990. Prior to this withdrawal, the 60th day for your response to this submission was July 16, 1990." App. 74.[4]

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[4] 28 C.F.R. § 51.25 provides: **Withdrawal of submission.** (a) A jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General. Notice of the withdrawal of a submission must be made in writing, addressed to the Chief, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The submission will be deemed withdrawn upon receipt of the notice. (b) Notice of withdrawals will be given to interested parties registered under § 51.32.

The Department of Justice formally acknowledged the withdrawal. App. 76.

On October 1, 1990, the State of Texas formally resubmitted its "submission of Chapter 632, Senate Bill 1379" for preclearance. App. 78.

By letters dated November 5, 1990 and November 20, 1990, well within sixty days from the resubmission date, the Attorney General objected to S.B. 1379 because the State of Texas had failed to meet its burden of proof as required by Section 5 of the Voting Rights Act. The Attorney General specifically found that "the use of the at-large election system with numbered posts and majority vote results in a clear violation of Section 2. . . . " and that the State of Texas had "not met its burden under Section 5 of showing the absence of a discriminatory purpose" in the adoption of S.B. 1379. These letters are reproduced at App. 80 and 85.

Pursuant to the letters of objection, plaintiffs, who are Black and Hispanic voters of Texas, challenged the implementation of S.B. 1379.[5] A three-judge district court was convened pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

At the hearing on the plaintiffs' motion for summary and injunctive relief, Texas, for the first time took the

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[5] Plaintiffs also challenged the method of electing those district court judges as violative of the thirteenth, fourteenth and fifteenth amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988. None of these claims has been decided below and none present any issue for decision in this appeal.

position that preclearance had already been secured by operation of law because the Attorney General had not objected within 60 days of the original submission date, February 13, 1990. Essentially, even though supplemental information had been submitted on several occasions and the correspondence clearly documented an understanding between Texas and the Attorney General that the deadlines had been extended pursuant to federal regulations, Texas now took the position that the supplemental information submitted was not material and thus the extension of the deadlines were invalid. A majority of the district court agreed with Texas.

In a 2-1 decision, the district court, using a non-voting rights case as authority, *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986), overruled the Attorney General's judgment that material supplemental information had been submitted by Texas and precleared S.B. 1379 by "operation of law"; the court precleared S.B. 1379 because the Attorney General had failed to object within 60 days from the original submission date. App. 10. It denied all relief to the plaintiffs.

Judge Bunton dissented. He filed his initial and supplemental dissents pointing out that supplemental information had been submitted extending the initial 60 day period, the extensions had been acknowledged by Texas without objection and that the Attorney General acted properly. App. 33-35.

The nonsubmission of S.B. 515:

S.B. 515 was enacted by the Texas legislature on May 11, 1971. It created the 200th and the 201st judicial districts with the 200th court created effective September 1,

1971 and the 201st court created effective January 1, 1973. App. 57. The Governor of Texas was authorized to appoint someone to these positions as of the effective dates of the courts and the appointee could hold office until the first elected term began.

The first general election for both of these courts was after November 1, 1972, the effective date for the preclearance requirements of Section 5 of the Voting Rights Act. The United States Attorney General took the position that on the face of the Statute, it appeared that these courts should be submitted to the Department of Justice for preclearance since Section 5 requires preclearance of all voting practices **imposed or applied** after November 1, 1972, 42 U.S.C. 1973c. App. 3.

The district court agreed with the defendants and cited *City of Lockhart v. United States*, 460 U.S. 125 (1983) for the proposition that the date of enactment rather than, as the plaintiffs argued, the date on which voters were first subjected to the voting procedure, as the appropriate date for determining applicability for Section 5. App. 5.

THE QUESTIONS ARE SUBSTANTIAL

Section 5 provides that any voting change in a covered jurisdiction such as the State of Texas may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). The questions in this case relate to the duty of a

federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection or requested a submission. This Court has granted probable jurisdiction in similar cases and reversed district courts that have failed to adequately enforce Section 5. *See, e.g., Blanding v. Dubose,* 454 U.S. 393 (1982); *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985); *McCain v. Lybrand,* 465 U.S. 236 (1984); *United States v. Board of Commissioners of Sheffield,* 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County,* 429 U.S. 642 (1977); *Connor v. Waller,* 421 U.S. 656 (1975). The Court should do the same here.

This portion of the jurisdictional statement will first discuss the district court's failure to enforce the letter of objection issued by the Attorney General. Second, it will discuss the district court's failure to require Section 5 preclearance of voting changes applied by Texas after November 1, 1972. Finally, it will suggest some remedies.

I. THE DISTRICT COURT ERRED IN DETERMINING THAT SUPPLEMENTAL INFORMATION SUPPLIED BY THE STATE OF TEXAS PURSUANT TO ITS SUBMISSION OF S.B. 1379 WAS NOT MATERIAL.

In *Blanding v. Dubose,* 454 U.S. 393 (1982), as in this case, a three judge district court failed to enforce a Section 5 objection; it determined that the Attorney General had failed to object within the 60 days by misinterpreting a "submission" as a "request for reconsideration", *Id.* at 398. This Court examined closely the correspondence

between the Attorney General and the submitting authority and noted that since the "submission" added no new changes to the election structure that had been previously objected to, the "submission" was in fact a "request for reconsideration" as interpreted by the Attorney General. It agreed with the Attorney General's interpretation and application of the federal regulations governing the preclearance process. The Court reversed the district court.

In this case, Texas submitted supplemental information twice. First, it supplemented with Sections 7 & 7a of the Texas Constitution; these Sections of the Texas Constitution provide for, among other things, terms of office, a description of judicial districts, a description of judicial district boards, and qualifications for judges. App. 63-67. Later, on May 16, 1990, Texas further supplemented the submission by requesting that the Attorney General consider the *LULAC v. Clements*, 902 F.2d 293 (5th Cir. 1990).[6] The *LULAC* decision interpreted the application of Section 2 of the Voting Rights Act to the judicial system of Texas.

Clearly, the supplemental information was material to the submission. The subject matter of the supplemental information dealt with Texas' judicial system, the very subject of S.B. 1379. In both instances the Attorney General found the supplemental information material to his analysis of S.B. 1379 and, as required by 28 C.F.R. 51.39, extended the deadline for the review process. Texas was aware of the extensions and did not object to them at the

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[6] This decision was subsequently vacated when the 5th Circuit decided to hear the case *en banc*. The *en banc* opinion is reported at 914 F.2d 620 (5th Cir. 1990).

time. The actions of the Attorney General were well within his discretion and consistent with the federal regulations. The district court was wrong in usurping the administrative process from the Attorney General and preclearing voting changes that were found violative of Section 5 of the Voting Rights Act.

Also, as in the *Blanding* decision, to allow the district court holding in this case to stand would allow a submitting authority to manipulate the submission process and frustrate the purpose of Section 5. A submitting authority could supply to the Attorney General supplemental information pursuant to 28 C.F.R. § 51.39, extend the 60-day period, agree that the extension was proper, then later come to court and claim that the supplemental information was not material and that the 60 day period had expired. *Supra* 454 U.S. at 400-401. As noted by Judge Bunton in his supplementary dissent to the district court opinion, "Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of 'supplementary materials' extended the objection deadline . . . " App. 35.

Further, in deciding that certain supplemental information submitted to the Attorney General was not material to the Attorney General's analysis, the district court, in effect, encroached upon an issue that is exclusively reserved for the Attorney General and the District Court for the District of Columbia: whether a proposed change actually discriminates on account of race, *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645-646, (1977). This court has made it clear that " . . . Congress expressly reserved for consideration by the District Court for the District of Columbia or the

Attorney General – the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.' " 429 U.S. at 645. In deciding that supplemental information was not material, the district court, by necessity, substituted its own judgement on what material is relevant in deciding whether or not a voting change violates Section 5 of the Voting Rights Act. This issue is clearly not within the scope of the three-judge district court, *Id.*

It is well settled that courts should afford "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," *Blanding, supra* 454 U.S. at 401, and that "[w]hen the construction of an administrative regulation rather than a statute is an issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In particular, this Court has emphasized "the Attorney General's key role in the formation of the [Voting Rights] Act," and has found his construction of the Act "persuasive evidence of the original understanding, especially in light of the extensive role [he] played in drafting the statue and explaining its operation to Congress." *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985); *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978); see also *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971). The court below, however, gave no weight to the Attorney General's interpretation of Section 5 and the administrative regulations governing supplemental information, but rather substituted its own judgment for that of the Attorney General.

The Attorney General's determination that material supplemental information had been received and that the deadline had been extended was neither "plainly erroneous" nor "inconsistent with [the Act or] the regulation[s]." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Texas knew about the extensions, agreed to them, was in no way prejudiced by them and objected to them only after the Attorney General interposed an objection.

Finally, another consideration is the minority community. In this case, counsel for the minority community monitored the submission of S.B. 1379 from is inception in an effort to protect their voting rights. In faithfully following the submission process, the correspondence between the Attorney General and the State of Texas made it clear that preclearance had not been secured.

The minority community filed suit after the election process began and it became evident that Texas had not yet complied with Section 5 of the Voting Rights Act. The district court's decision dismissing the plaintiffs claim places the minority community in the position of having to second guess the Attorney General's determination that supplemental information has been received and having no remedy if, later, a district court disagrees with the Attorney General. Such a situation is clearly unfair to the minority community and certainly was not intended by Congress when it enacted the Voting Rights Act.

For the reasons set forth above, it was a reasonable exercise of the Attorney General's discretion under the Act, and was fully consistent with the Act and the regulations governing its administration.

II. NEWLY CREATED ELECTED POSITIONS WHOS FIRST ELECTION OCCURRED AFTER NOVEMBER 1, 1972, MUST BE PRECLEARED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT.

Section 5 in express terms reaches any voting standard, practice, or procedure that is **imposed or applied** by any State or political subdivision "different from that in force or effect on November 1, 1972." (emphasis added) 42 U.S.C. 1973c. Clearly the **voting procedures** for the courts created by S.B. 515 were **applied,** for the first time, after November 1, 1972. This is why the Attorney General opined that those voting changes should be submitted for preclearance.

In the case of the 200th district court, its effective date of creation was September 1, 1971. App. 57. At that point, it was an appointed office and Charles D. Mathews was appointed by the governor on August 27, 1971. App. 88. The first general election for this court, admitted by the defendants at trial, was held after November 1, 1972. (The primaries for this office were conducted before that date, see App. 5).

In the case of the 201st district court, its effective date of creation was January 1, 1973. App. 57. At that point, it became an appointed position and David S. McAngus was appointed by the Governor on December 28, 1972. App. 89. It was not until 1974 when the first primary and general elections were conducted for this court, well after the November 1, 1972 effective date of Section 5. App. 92.

Clearly, as admitted by both parties, the first **election** where there was a determination by the voters on who would be **elected** to the 200th and the 201st district court

occurred after November 1, 1972. More to the point, the first time the minority voters of Travis County were subjected to the at-large election of office holders to the 200th and 201st district courts was after November 1, 1972.

The district court cited *City of Lockhart v. United States*, 460 U.S. 125 (1983) and *Perkins v. Matthews*, 400 U.S. 379, 394 (1971) for the proposition that date of enactment of a statute is the determinative date for coverage of the Act. This is a clear misreading of these cases. In fact, these cases make it clear that the court should look at what and when voting practices are actually **applied** by a jurisdiction and ignore the enactment date of a state statute. In *Perkins*, a state statute was passed in 1962 mandating at-large city elections. The City of Canton ignored the mandate and conducted elections by district in 1965. In 1969, Canton went to an at-large election system and claimed they did not have to preclear the change because the state statute mandating at-large elections was passed in 1962, before the 1964 coverage date of the Voting Rights Act.

The Supreme Court held that preclearance was required regardless of the enactment date of the state statute because, had the election been held November 1, 1964, Canton would have, as it did in 1965, used a single member district election system. Since that is different from at-large elections, the Act applied, regardless of the enactment date of the state statute, *supra* at 394. The *Perkins* case makes it clear that date of enactment is not the determinative date for coverage of the Voting Rights Act.

Using the *Perkins* rationale in this case, had Texas conducted state elections on November 1, 1972, both the 200th and 201st district courts would not have had elections because, at that point, neither court was an elected office. The 200th court was an appointed office, and the 201st court was not in existence until January 1, 1973 when the Governor made his appointment. The 201st court did not become an elected office until 1974.[7]

Further, as stated earlier, this Court has consistently held that the Attorney General should be accorded great deference in interpreting the Voting Rights Act, see pages 12 and 13 above. The district court gave very little weight to the Attorney General's opinion on this issue.

III. THIS COURT SHOULD REINSTATE THE ATTORNEY GENERAL'S LETTER OF OBJECTION, ORDER THAT ELECTIONS HELD PURSUANT TO S.B. 1379 BE SET ASIDE, ORDER THE SUBMISSION OF S.B. 515 TO THE ATTORNEY GENERAL FOR PRECLEARANCE AND REMAND THE CASE TO THE DISTRICT COURT FOR FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's erroneous holding regarding Section 5, it permitted the election and the winners to take office in certain judgeships even though the Attorney General objected under Section 5 to the

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[7] Clearly, this is the only fair way to interpret the coverage issue. If S.B. 515 authorized the creation of a new district court every two years into the future, preclearance would clearly be required everytime a new court was up for its first election.

method of electing those judgeships. In *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985), this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees *fail to seek this approval, or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside*.

470 U.S. at 182-183 (emphasis added). In the present case, the State has submitted S.B. 1379 to the Attorney General for approval, and the Attorney General has objected. Under the *Hampton County* rule, elections held pursuant to S.B. 1379 and objected to by the Attorney General should be set aside. Also, the State has refused to submit S.B. 515. Again, under *Hampton County*, the district court can order the state to submit S.B. 515 to the Attorney General for preclearance.

In addition to the above remedies, the district court can determine what further remedial measures are necessary in light of the rights of minority voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For example, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an iterim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982). In the meantime, of course, the State of Texas remains free to pass and preclear legislation that would cause these judgeships to be elected in a manner that satisfies the Voting Rights Act.

CONCLUSION

For the reasons stated above, the district court opinion should be summarily reversed and the Attorney General's letter of objection should be upheld.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et. al., Plaintiffs,	§	
v.	§	MO-90-CA-171
THE STATE OF TEXAS, Defendant,	§	A-90-CA-1018 (Consolidated)
and	§	FILED DEC 26 1990
FAITH JOHNSON, et. al., Defendant-Intervenors.	§	
UNITED STATES OF AMERICA, Plaintiff,	§	
v.	§	
STATE OF TEXAS, et. al, Defendants.	§	

Before JERRY E. SMITH, Circuit Judge, LUCIUS D. BUNTON, III, Chief District Judge, and WALTER S. SMITH, JR., District Judge. J. SMITH and W. SMITH CONCUR. L. BUNTON CONCURS IN PART and DISSENTS IN PART.

MEMORANDUM OPINION AND ORDER

In this consolidated case we sit as a special three-judge court pursuant to section 5 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. § 1973c. The private plaintiffs in one action (No. MO-90-CA-171) and the United States in the other (No. A-90-CA-1018) ask us to enjoin

the implementation, or continuing implementation, of certain alleged voting changes affecting the selection of state district judges in several designated counties in Texas. We conclude that as a matter of law the plaintiffs are entitled to no relief.

I.

For the sake of simplicity, we consider the challenged judgeships in two groups: (1) the Travis County judgeships and (2) the judgeships in what we will term the "other challenged counties," which include the Texas counties of Dallas, Lubbock, Tarrant, and Victoria. Our basis for denying relief differs between the two groups, as their legal status is dissimilar. As to both groups, the plaintiffs challenge the continuing implementation of county-wide voting for multiple state district judge positions within each of the subject counties. They assert that the at-large election of state district judges is in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The United States Court of Appeals for the Fifth Circuit recently has held that section 2 does not apply to the election of judges. *See League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990) (en banc) (overruling *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988)), *petition for cert. filed sub nom. Houston Lawyers' Ass'n v. Mattox*, 59 U.S.L.W. 3406 (U.S. Nov. 21, 1990) (No. 90-813). Based at least in part, if not entirely, upon its view that it is not bound by that decision (hereinafter "*LULAC*"), the Attorney General of the United States on November 5, 1990, interposed an objection to the implementation of

new district judgeships in the other challenged counties. The objection was interposed pursuant to the Attorney General's conclusion that the State of Texas had not carried its burden, under section 5, of showing that the new judgeships would not violate section 2.

A few days earlier, on October 26, 1990, the private plaintiffs had filed the instant complaint in No. MO-90-CA-171. They assert that the new judgeships in the other challenged counties may not be implemented because, *inter alia*, they have not been precleared, allegedly as required by section 5, by either the Attorney General or the United States District Court for the District of Columbia.

Additionally, the private plaintiffs assert that two district judgeships in Travis County have not received preclearance as required. The private plaintiffs seek an injunction proscribing all further elections in Travis County and the other challenged counties until preclearance is obtained.

Following the Attorney General's interposition of an objection as to the other challenged counties on November 5, the United States filed the instant complaint in No. A-90-CA-1018, seeking to enjoin the implementation of the asserted voting changes in the other challenged counties. The United States and the Attorney General now contend, as well, that the Travis County judgeships were subject to preclearance requirements, were not precleared, and now should be submitted for preclearance.

II.

We conclude that creation of the Travis County judgeships at issue here is not subject to the preclearance requirement of section 5. The judgeships in question are the 200th and 201st judicial district courts, which were added to Travis County by S.B. 515, which bill was signed by the governor on June 1, 1971, and became effective on August 20, 1971. The bill created the 200th judicial district court effective September 1, 1971, and the 201st effective January 1, 1973.

Section 5 was not applicable to Texas at that time, but the state became a covered jurisdiction on August 6, 1975, by operation of Pub. Law No. 94-73, the 1975 amendments to the Act. Section 204 of the enactment, 89 Stat. 402, added language to section 5 to require preclearance as to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972.

Thus, in order to be a covered change, and electoral change in Texas must be different from one in "force or effect" as of November 1, 1972. S.B. 515 was in effect long before that date and has remained unchanged thereafter. The effective date of the law, not the dates on which the respective judgeships were first filled through appointment or election, are determinative for purposes of section 5.

At least one three-judge voting rights court in Texas has so held. In *Hereford Indep. School Dist. v. Bell*, 454 F. Supp. 143, 145 (N.D. Tex. 1978) (three-judge court), the court explained that preclearance was required for election procedures "*enacted* after November 1, 1972."

[Emphasis added.] The same conclusion was suggested by the Supreme Court in *Briscoe v. Bell*, 432 U.S. 404, 413 n. 12 (1977), which noted that as to Texas, the 1975 amendments established November 1, 1972, as "the precise date at which a coverage determination becomes effective, thereby requiring, for example, preclearance of any laws affecting voting rights *after* that date." [Emphasis added.]

The applicable test was enunciated in *City of Lockhart v. United States*, 460 U.S. 125 (1983). The Court observed that in ascertaining whether a change has a proscribed effect, "[t]he proper comparison is between the new system and the system actually in effect on November 1, 1972. . . ." *Id.* at 132. Quoting *Perkins v. Matthews*, 400 U.S. 379, 394 (1971), the *Lockhart* court noted that "'§ 5's reference to the procedure "in force or effect on November 1, 19[72]," must be taken to mean the procedure that would have been followed if the election had been held on that date.' "

Here, the "system actually in effect on November 1, 1972," included the existing 200th and 201st district courts. A judge had been gubernatorily appointed to the 200th court in August 1971, and primary elections were conducted in the spring of 1972. Although the general election was held within a few days after November 1, 1972, absentee balloting was well underway by that date. A judge was gubernatorily appointed to the 201st court in January 1973. The primary and general elections were conducted, respectively, in the spring and fall of 1974.

Under the reasoning in *Perkins*, if a hypothetical election had been conducted for the 200th and 201st courts on

November 1, 1972, it would have been conducted under the system in place prior to that date, which included the existing two courts in question. Thus, we conclude that the date of enactment, rather than the dates of the first elections for the respective two courts, is the appropriate date by which to determine applicability of section 5.

We also observe that looking to the date of enactment is consistent with the posture taken by the Attorney General concerning the questioned judgeships in the other challenged counties. In his letter of November 5, 1990, the Attorney General interposed objection to the changes effected by the *enactment* of the bill creating those courts. The Attorney General cannot have it both ways: If enactment is the operative event for purposes of the judgeships in the other challenged counties, the same must be true for the Travis County judgeships, as well. Hence, we deny all relief as to the Travis County judgeships.

III.

We conclude that creation of the questioned judgeships in the other challenged counties was precleared by operation of law, assuming *arguendo* that the creation of new judgeships such as those at issue is subject to section 5's preclearance requirement. The judgeships being challenged herein in the other challenged counties were created by S.B. 1379, which was signed by the governor on June 14, 1989, and established the judgeships effective

September 1, 1989. The bill created fifteen judgeships, which are set forth in the margin.[1]

Section 5 permits a covered jurisdiction, such as Texas, to seek preclearance of electoral changes either by filing a declaratory judgment action in the United States District Court for the District of Columbia or by submitting the changes to the Attorney General. By the specific terms of section 5, a submitted change is deemed precleared as a matter of law if "the Attorney General has not interposed an objection within sixty days after such submission."

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[1]

Court	*County(ies)*	*Challenged*
363rd	Dallas	Yes
364th	Lubbock	Yes
365th	Dimmitt, Maverick, Zavala	No
366th	Collin	No
367th	Denton	No
368th	Williamson	No
369th	Anderson, Cherokee	No
370th	Hidalgo	No
371st	Tarrant	Yes
372nd	Tarrant	Yes
373rd	Tarrant	No
374th	Tarrant	No
375th	Tarrant	No
376th	Tarrant	No
377th	Victoria	Yes

For purposes of the present request under § 5 for injunctive relief, only those judgeships marked "Yes" under the "Challenged" column are being questioned by the plaintiffs. The 373rd, 374th, 375th, and 376th courts do not exist, although nominally authorized by S.B. 1379, as the statutory conditions necessary to bring them into existence have not been met.

The Attorney General has promulgated regulations designed to implement the preclearance contemplated by section 5. *See* 28 C.F.R. ch. 1 pt. 51, "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended." The regulations reiterate the provision in section 5 that a matter is deemed precleared if not objected to by the Attorney General within sixty days. 28 C.F.R. § 51.1(a)(2) (1990).

During the sixty-day period, the Attorney General may, *by letter*, request "any omitted information considered necessary for the evaluation of the submission." *Id.* § 51.37(a). Significantly, "[w]hen a submitting authority provides documents and written information *materially supplementing* a submission . . . , the 60-day period . . . will be calculated from the receipt of the supplementary information. . . . " *Id.* § 51.39(a) (emphasis added).

The State of Texas asserts that S.B. 1379 was precleared by operation of law in that sixty days had elapsed from its initial submission without either (1) the interposition of an objection or (2) the submission of "materially supplementing" information. We agree and, hence, deny all relief as to the judgeships in the other challenged counties.

The state submitted S.B. 1379 to the Attorney General on February 13, 1990; the sixtieth day for interposing an objection was April 16, 1990. During the period between February 13 and April 16, the state provided no additional material, with one exception.

On March 23, following a telephone conversation with an employee of the United States Department of Justice (DOJ), the state telecopied a copy of Tex. Const.

art. V, §§ 7 and 7a, to the Voting Rights Section of the Civil Rights Division of the DOJ. Each of those constitutional sections had been precleared by the Attorney General by letter dated October 1, 1985.

By letter dated April 11, the Attorney General's office notified the state that supplemental information had been received and that, consequently, the deadline for objection had been extended to May 22. The letter did not assert that the additional information constituted a *material* supplement.

Between March 23 and May 22, the state furnished no additional material, with one exception. By letter dated May 16, referencing a telephone conversation with a DOJ employee, the state, by letter to that employee, requested that she consider, in regard to the submission of S.B. 1379, the panel opinion in *LULAC*, 902 F.2d 293 (5th Cir. 1990) (declaring section 2 inapplicable to multi-member, county-wide judgeships), and the then-anticipated en banc opinion (which in fact was issued the following September).

By letter dated May 18, the Attorney General's office notified the state that by virtue of the state's May 16 letter, the deadline for objection had been extended to July 16 (the sixtieth day after May 16). Then, following the en banc oral arguments in *LULAC* that occurred on June 19, 1990, the state, by letter dated July 2, 1990, purported to withdraw its submission of S.B. 1379. Immediately following issuance of the en banc opinion in *LULAC* on September 28, 1990, the state on October 2 resubmitted S.B. 1379 to the Attorney General, requesting preclearance.

We hold that neither the telecopy of March 23, 1990, nor the letter of May 16, 1990, constitutes a material supplemental submission necessary to extend the sixty-day period provided to the Attorney General for interposing an objection. If the March 23 telecopy thus did not start the sixty-day period running anew, S.B. 1379 was precleared by operation of law on April 16, 1990. Assuming *arguendo* that the March 23 telecopy was a material supplemental submission, the sixty-day period nevertheless expired on May 22, as the letter of May 16 was not a material supplemental submission.

The assertion that the telecopying of two sections from the Texas constitution started the sixty-day period running anew is entirely without merit. Those constitutional sections were available as published legal materials in any reasonably complete law library; the DOJ does not argue that it had no easy access to the same. Moreover, the sections had been precleared by the Attorney General several years previously. They were not at issue, directly or indirectly, in the submission of S.B. 1379.

Facts are "material" if they "might affect the outcome . . . under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no respect in which the submission to the Attorney General of a copy of readily available provisions, of which the Attorney General was well aware and which already had received the close scrutiny of the preclearance process, possibly could have "affected the outcome" of the submission of S.B. 1379.

Additionally, section 51.39(a) of the regulations, discussed *supra*, requires that in order to re-start the sixty-

day period, the new documents must be "materially supplementing" the initial submission. Even assuming *arguendo* that the documents here were "material," they cannot reasonably be deemed to have "supplemented" the submission of S.B. 1379. As we have observed, the Attorney General already knew of the constitutional sections, had ready access to them, and had precleared them. The mere sending of copies of them to the DOJ did not add to, or supplement, anything.

Finally, section 51.37(a) of the regulations, discussed *supra*, requires that any additional information needed by the Attorney General must be requested "by letter." It is acknowledged that the sections of the Texas constitution, if requested at all, were asked for by telephone. In summary, then, the March 23 telecopy did not trigger a new sixty-day period, and S.B. 1379 was precleared by operation of law on April 16.

Assuming *arguendo* that a new sixty-day period began running on March 23, it expired on May 22, and the state's letter of May 16 cannot be deemed a "materially supplementing" submission. The May 16 letter merely called the DOJ's attention to the pendency of the *LULAC* case. But that information did not "supplement" anything.

As of May 16, the DOJ was participating actively as amicus curiae in *LULAC*, in which oral argument was presented before the Fifth Circuit panel on April 30, with a panel opinion issued on May 11. *See LULAC*, 902 F.2d 293 (5th Cir. 1990). On May 16, the court entered its order granting rehearing en banc in *LULAC*. *See LULAC*, 902

F.2d 322, 323 (5th Cir. 1990). The DOJ participated in briefing and oral argument before the en banc court.

Thus, the DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission. The DOJ was undeniably cognizant of the fact that both *LULAC* and S.B. 1379 involved the question of at-large voting for district judges in Texas. A letter asking the DOJ to consider *LULAC* in reviewing S.B. 1379 thus certainly was not "material" and could not have "supplemented" any information or knowledge that the DOJ or the Attorney General already had.

Accordingly, the mere sending of the May 16 letter did not trigger a new sixty-day period under section 51.39(a). The sixty-day period, even if started anew on March 23, expired on May 22, and consequently, in the alternative, was precleared by operation of law on May 22. The purported withdrawal of the submission on July 2 had no legal effect, as by operation of law the preclearance had already occurred, and the state was free to implement the electoral changes, if any, encompassed by S.B. 1379.

Finally, as to the letter of May 16, we note that the Attorney General apparently never deemed the *LULAC* litigation material, in any event, for purposes of the preclearance of S.B. 1379. That is evident from the fact that, despite the Fifth Circuit's en banc conclusion that section 2 does not apply to the election of judges, the Attorney General, in his letter of November 5 interposing an objection to S.B. 1379, acknowledged the *LULAC* en banc opinion but declined to follow it. Instead, the November 5

letter declares that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . . "

Hence, for this additional reason, the *LULAC* litigation, from the Attorney General's point of view, was not a "material" or "supplemental" submission that, under section 51.39(a), could have triggered a new sixty-day period for the interposition of objections. Therefore, S.B. 1379 has been precleared by operation of law, and thus the prerequisites for an injunction under section 5 have not been satisfied.

IV.

We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.

Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . . " During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the

LULAC decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible later resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

The aim of the United States here is salutary – to effect the laudable goals of the Act by opposing changes that, in the view of the Attorney General, have the purpose or effect of diminishing the role of minorities in the electoral process. However, as the instant action is brought under the Act, both this court and the Attorney General are limited to the role assigned by Congress in passing the Act.

The Circuit court by which this district court is bound (absent Supreme Court directive) has declared that section 2 does not apply to the election of judges. The United States, as a litigant in this court, is bound by that determination. Likewise, it may not wield its administrative sword in this circuit in contravention of the interpretation of the Act enunciated by the Fifth Circuit (again, absent any intervening declarations by the Supreme Court).[2]

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[2] We also observe that the result of the Attorney General's position here, if allowed to prevail, is somewhat mixed. One of

(Continued on following page)

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

V.

In summary, no preclearance was required for S.B. 515, and S.B. 1379 was precleared by operation of law. Hence, the requirements for injunctive relief under section 5 have not been met.[3] We deny all relief. It is so ordered.

(Continued from previous page)

the challenged judgeships involves a black female elected in 1990 in Dallas County; another challenge, in Tarrant Court, would bring about the removal from the bench of an Hispanic make who has served as a state judge for many years.

[3] *See also Hunter v. City of Monroe*, Civ. Ac. No. 90-2031 (W.D. La. Nov. 7, 1990) (three-judge court) (holding that § 5 does not apply to the mere addition of judgeships to an existing judicial structure).

/s/ J. Smith
JERRY E. SMITH
United States Circuit Judge

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

BUNTON, LUCIUS D., Chief District Judge, CONCURRING IN PART AND DISSENTING IN PART.

I concur in the part of Judge Smith's opinion that the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard,

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[4]

COURT	COUNTY
363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] Texas, as a covered jurisdiction under this section[6], must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S. B. 1379,[7] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this information, the Attorney General extended the objection deadline to May 22, 1990.

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[5] *See* 42 U.S.C. §1973c.

[6] See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975.

[7] The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective August 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, nothing that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violation of Section 5 does exist, what is the appropriate remedy?[8]

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[8] See *McCain v. LyBrand*, 465 U.S. 236, 250, n.17, 79 L.Ed.2d 271, 282, 104 S.Ct. 1037 (1984) ("The only questions in an action alleging a violation of the §5 preclearance requirements are (1) whether a change is covered by §5, (2) if the change is covered, whether §5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); *Lockhart v. United States*, 460 U.S. 125, 129, n. 3, 74 L.Ed.2d 863, 103 S.Ct. 998 (1983).

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[9] The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ".[10] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit [sic] to the requirements of Section 5.[11] although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered by Section 5",[12] it goes on to add, "Texas understands that this Court is bound by the Supreme Courts summary affirmances in two cases in which these legal arguments were rejected."[13] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues

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[9] 28 C.F.R. Pt. 51, Appendix (1990).

[10] See 42 U.S.C. §1973(c).

[11] *Brooks v. State Board of Elections*, No. CV 288-146 (S.C.Ga. Dec. 1, 1989), *modified* (May 29 and June 25, 1990), *aff'd mem.*, Nos. 90-272 & 93-332 (U.S. October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

[12] Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

[13] *Id.*

S.B.1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

Under Section 5, Texas could pursue either the two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Under Section 5, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to Section 5, submission of "additional information" extends the deadline. Thus, the new deadline became May 22, 1990.[14]

Within this new period (on May 16th), Texas submitted additional information to the Attorney General in the form of a letter requesting that its preclearance request be

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[14] On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

considered in accordance with *LULAC*.[15] This resulted in extension of the objection deadline to July 16, 1990.[16]

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain This action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990". Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[17] Texas' actions in requesting and accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "additional material" extended the objection deadline to July 16, 1990. With this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

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[15] On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of additional information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of additional materials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

[16] In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

[17] 28 C.F.R. §51.25(a) (1990).

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[18] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared

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[18] The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objection period.

pursuant to §5.' "[19] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Courts for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . "[20] In the interests of justice, preclearance must be sought within sixty days.

This leaves open the status of the unprecleared judgeships during the pendency of this process. The United States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found noncompliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193. I agree that in the interim of the preclearance process, the judges presiding in the 363rd, 364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[21]

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[19] *Haith*, supra note 7, at 414.

[20] *See* 42 U.S.C. §1973c.

[21] I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their

(Continued on following page)

Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC v. Mattox* case before the Fifth Circuit constituted any sort of a waiver on the part of the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the Fifty states of the United States, each statute passed by those states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State

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(Continued from previous page)

respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial brothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in LULAC was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in *Sonnet 35*, reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

> Roses have thorns, and silver fountains mud;
> Clouds and eclipses stain both moon and sun;
> And loathsome canker lives in sweetest bud. All
> men make faults.

The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[22] which deprived many people of their rights and led to our most unfortunate historic conflict.

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.

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[22] In *Dred Scott v. Sandford*, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

SIGNED this 26th day of December, 1990.

/s/ Lucius D. Bunton
Honorable Lucius D. Bunton
Chief Judge

MO90CA171
A90CA1018
SUPPLEMENTARY DISSENT

FILED DEC 27 1990

BUNTON, LUCIUS D., Chief District Judge, CONCURRING IN PART AND DISSENTING IN PART.

I concur in the part of the majority's opinion that finds the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

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[4]

COURT	COUNTY
363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] However, if the submitting authority provides "supplementary information" for evaluation, the sixty day period is recalculated from receipt of the supplementary information.[6] Texas, as a covered jurisdiction under this section[7], must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S.B. 1379,[8] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two

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[5] *See* 42 U.S.C. §1973c.

[6] 28 C.F.R. § 51.39(a) (1990).

[7] See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975).

[8] The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective august 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this supplementary information, the Attorney General extended the objection deadline to May 22, 1990.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, noting that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violation of Section 5 does exist, what is the appropriate remedy?[9]

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[9] See *McCain v. LyBrand*, 465 U.S. 236, 250, n.17, 79 L.Ed.2d 271, 282, 104 S.Ct. 1037 (1984) ("The only questions in an action alleging a violation of the §5 preclearance requirement are (1)

(Continued on following page)

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[10] The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ".[11] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit [sic] to the requirements of Section 5.[12] Although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered

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whether a change is covered by §5, (2) if the change is covered, whether §5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); *Lockhart v. United States*, 460 U.S. 125, 129, n. 3, 74 L.Ed.2d 863, 103 S.Ct 998 (1983).

[10] 28 C.F.R. Pt. 51, Appendix (1990).

[11] See 42 U.S.C. §1973(c).

[12] *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989), *modified* (May 29 and June 25, 1990), *aff'd mem.*, Nos. 90-272 & 93-332 (U.S. October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

by Section 5",[13] it goes on to add, "Texas understands that this Court is bound by the Supreme Courts summary affirmances in two cases in which these legal arguments were rejected."[14] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues S.B. 1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

Under Section 5, Texas could pursue either of two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Accordingly, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to 28 C.F.R. § 51.39, submission of "suplementary

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[13] Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

[14] *Id.*

information" extends the deadline. Thus, the new deadline became May 22, 1990.[15]

Within this new period (on May 16th), Texas submitted supplementary information to the Attorney General in the form of a letter requesting that its preclearance request be considered in accordance with *LULAC*.[16] This resulted in extension of the objection deadline to July 16, 1990.[17]

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain this action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990". Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[18] Texas' actions in requesting and

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[15] On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

[16] On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of supplemental information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of supplemental materials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

[17] In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

[18] 28 C.F.R. §51.25(a) (1990).

accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "supplementary materials" extended the objection deadline to July 16, 1990 with this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[19] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.[20]

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

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[19] The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objection period.

[20] *See* 28 U.S.C. §51.39 (1990).

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared pursuant to §5.' "[21] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Courts for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ."[22] In the interests of justice, preclearance must be sought within sixty days.

This leave open the status of the unprecleared judgeships during the pendency of this process. The United States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found noncompliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193. I agree that in the interim of the preclearance process, the judges presiding in the 363rd,

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[21] *Haith*, supra note 7, at 414.

[22] *See* 42 U.S.C. § 1973c.

364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[23] Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC* case before the Fifth Circuit constituted any sort of a waiver on the part of the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the fifty states of the United States, each statute passed by those

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[23] I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial brothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in *LULAC* was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in *Sonnet* 35, reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

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The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[24] which deprived many people of their rights and led to our most unfortunate historic conflict.

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

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[24] In *Dred Scott v. Sandford*, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.

SIGNED this 26th day of December, 1990.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, et al.,	)	
Plaintiffs,	)	MO-90-CA-171
v.	)	FILED
THE STATE OF TEXAS,	)	DEC 04 1990
Defendant.	)	

ORDER

BEFORE THIS COURT is the Plaintiff's Motion in *United States v. Texas, et al.*, A-90-CA-1018, to consolidate it with the above-captioned cause. After due consideration, the Court finds the motion contains merit. Accordingly,

IT IS ORDERED MO-90-CA-171 and A-90-CA-1018 are consolidated under cause number MO-90-CA-171.

SIGNED this 4th day of December, 1990.

/s/ Lucius D. Bunton
HONORABLE
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et. al.	§	CIVIL ACTION #MO-90-CA-171
Plaintiffs,	§	
vs.	§	FILED JAN 07 1991
THE STATE OF TEXAS	§	
Defendant	§	

PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT OF THE THREE JUDGE DECISION PURSUANT TO 42 USC 1973c

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Notice is hereby given that Plaintiffs-Appellants Mexican American Bar Association (MABA) et. al., hereby appeal to the United States Supreme Court the three judges decision of December 26, 1990.

Respectfully submitted,

DATED: January 4, 1991

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CERTIFICATE OF SERVICE

This is to certify that a copy of Plaintiffs' Notice of Appeal has been sent by First Class Mail to the Attorney General for the State of Texas, the United States Department of Justice and Counsel for the Intervenors on this 4th day of January, 1991.

/s/ Rolando L. Rios
Rolando L. Rios
Attorney for Plaintiffs

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of

denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

CAUSE NO. MO-90-CA-171
EXHIBIT 5 of Plaintiffs

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

February 8, 1990

Assistant Attorney General
U.S. Department of Justice
Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

RE: Submission under Section 5, Voting Rights Act, of Senate Bill 1379, 71st Legislature, 1989.

Dear Sir:

Enclosed is a certified copy of Senate Bill 1379, submitted in compliance with Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C.A. § 1973c [West Supp. 1989]).

The authority responsible for the passage of the Act was the Texas Legislature. This Act was adopted pursuant to the provisions of Tex. Const. art. III, § 30. The procedure for the adoption of the change is not subject to preclearance. This Act was passed by the Texas Senate on May 22, 1989, and passed by the House of Representatives of Texas, with amendments, on May 27, 1989. The Senate concurred in the House amendments on May 28, 1989. The Act was signed by Governor William P. Clements, Jr. on June 14, 1989. The Act took effect on September 1, 1989. All language in the Act is new language.

The purpose of Senate Bill 1379 is to create certain new district courts to relieve the overcrowding of the dockets of the existing district courts in the various counties in which the new district courts will have jurisdiction.

Section 1 of the Act, effective September 1, 1989, amends the Texas Government Code by adding new Sections 24.508 through 24.515. Section 24.508 creates the 363rd District Court of Dallas County. Section 24.509 creates the 364th District Court of Lubbock County. Section 24.510 creates the 365th District Court of Dimmit, Maverick, and Zavala Counties. Section 24.511 creates the 366th District Court of Collin County. Section 24.512 creates the 367th District Court of Denton County. Section 24.513 creates the 368th District Court of Williamson County. Section 24.514 creates the 369th District Court of Anderson and Cherokee Counties. Section 24.515 creates the 370th District Court of Hidalgo County.

Section 2 of the Act, effective September 1, 1990, amends the Texas Government Code by adding new Sections 24.516 and 24.517, which create the 371st and 372nd District Courts of Tarrant County, respectively.

The vacancies that will be created when the District Court judgeships set forth in Sections 1 and 2 of the Act take effect will initially be filled by appointment of the Governor (pursuant to Article IV, Section12, of the Texas Constitution), and the judgeships in all of those courts will appear on the 1990 primary and general election ballots. The person elected will begin a full four-year term on January 1, 1991, in accordance with Article V, Section 7, of the Texas Constitution.

Section 3 of the Act amends the Texas Government Code by adding new Sections 24.518, 24.519, 24.520, and 24.521, which create the 373rd, 374th, 375th, and 376th District Courts of Tarrant Court, respectively. Section 3 takes effect on September 1, 1991, but only if: (1) Senate Bill 1694 of the 71st Legislature (1989) becomes law, and (2) the voters of Tarrant County vote to approve creation of the Tarrant County Crime Control District and adoption of a local sales and use tax prior to September 1, 1991. Senate Bill 1694 became law on June 14, 1989, and was precleared by you on November 6, 1989. The procedures for the election creating the Tarrant County Crime Control District and adoption of the sales and use tax are set forth in Article 3 of the Senate Bill 1694.

Section 4 of the Act amends the Texas Government Code by adding a new Section 24.522 which creates the 377th District Court of Victoria County. This court is created on the date on which funding is available either: (1) through legislative appropriation; (2) through the provisions of Chapter 317 of the Texas Government Code; or (3) by the Victoria County Commissioners Court. Section 5 of the Act made an appropriation in an amount necessary to create the 377th District Court of Victoria County pursuant to the mechanism described in new Section 24.522(b)(1) of the Texas Government Code. This court was, therefore, created on September 1, 1989 (the commencement of the 1990-1991 General Appropriations Act biennium). The vacancy created by the new court will be filled by appointment of the Governor (pursuant to Article IV, Section 12, of the Texas Constitution), and the judgeship will appear on the 1990 primary and general election ballots. The person elected will begin a full four-

year term on January 1, 1991, in accordance with Article V, Section 7, of the Texas Constitution.

The prior law amended by this Act, the Texas Government Code, adopted in 1985, is not subject to preclearance because that Code was a nonsubstantive recodification of existing law.

The provisions of Senate Bill 1379 do not affect members of racial or language minority groups differently from the way they affect the general public. For further information regarding the effect of this bill on minorities, contact:

Mr. Pete Perez	Judge Mary Ellen Hicks
200 West Belknap	100 East Weatherford
Fort Worth, TX 76196	Fort Worth, TX 76196
(817) 334-1426	(817) 334-1613

The provisions of this Act have not been implemented. There is no past or pending litigation involving Senate Bill 1379 or the changes that it would authorize.

If you have any questions or need additional information, please contact Austin Bray, Assistant General Counsel, Election Division, at (512) 463-5650.

Very truly yours,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/senate/im

CAUSE NO. MO-90-CA-171
EXHIBIT 3 of Plaintiffs

(SEAL)

The State of Texas
Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached is a TRUE AND CORRECT copy of Senate Bill 1379, passed by the 71st Legislature, Regular Session, 1989, as signed by the Governor on June 14, 1989, and as filed in the office on June 15, 1989.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 25th day of June, 1989.

(SEAL)

/s/ George S. Bayoud Jr.
Secretary of State

AN ACT

relating to the creation of judicial districts; making an appropriation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Effective September 1, 1989, Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.508 through 24.515 to read as follows:

Sec. 24.508. 363RD JUDICIAL DISTRICT (DALLAS COUNTY). (a) The 363rd Judicial District is composed of Dallas County.

(b) The 363rd District Court shall give preference to criminal cases.

Sec. 24.509. 364TH JUDICIAL DISTRICT (LUBBOCK COUNTY). The 364th Judicial District is composed of Lubbock County.

Sec. 24.510. 365TH JUDICIAL DISTRICT (DIMMIT, MAVERICK, AND ZAVALA COUNTIES). The 365th Judicial District is composed of Dimmit, Maverick, and Zavala counties.

Sec. 24.511. 366TH JUDICIAL DISTRICT (COLLIN COUNTY). The 366th Judicial District is composed of Collin County.

Sec. 24.512. 367TH JUDICIAL DISTRICT (DENTON COUNTY). The 376th Judicial District is composed of Denton County.

Sec. 24.513. 368TH JUDICIAL DISTRICT (WILLIAMSON COUNTY). The 368th Judicial District is composed of Williamson County.

Sec. 24.514. 369TH JUDICIAL DISTRICT (ANDERSON AND CHEROKEE COUNTIES). The 369th Judicial District is composed of Anderson and Cherokee Counties.

Sec. 24.515. 370TH JUDICIAL DISTRICT (HIDALGO COUNTY). The 370th Judicial District is composed of Hidalgo County.

SECTION 2. Effective September 1, 1990, Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.516 and 24.517 to read as follows:

Sec. 24.516. 371ST JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 371st Judicial District is composed of Tarrant County.

(b) The 371st District Court shall give preference to criminal cases.

Sec. 24.517. 372ND JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 372nd Judicial District is composed of Tarrant County.

(b) The 372nd District County shall give preference to criminal cases.

SECTION 3. (a) Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.518 through 24.521 to read as follows:

Sec. 24.518. 373RD JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 373rd Judicial District is composed of Tarrant County.

(b) The 373rd District Court shall give preference to criminal cases.

Sec. 24.519. 374TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 374th Judicial District is composed of Tarrant County.

(b) The 374th District Court shall give preference to criminal cases.

Sec. 24.520. 375TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 375th Judicial District is composed of Tarrant County.

(b) The 375th District Court shall give preference to criminal cases.

Sec. 24.521. 376TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 376th Judicial District is composed of Tarrant County.

(b) The 376th District Court shall give preference to criminal cases.

(b) The board of the Tarrant County crime control district shall reimburse the state for the costs of salaries of judges and other court personnel and payments for retirement plans and other employee benefits for courts created under this section.

(c) This section takes effect September 1, 1991, but only if:

(1) S.B. No. 1694, 71st Legislature, Regular Session, 1989, is enacted and becomes law; and

(2) the voters of Tarrant County vote to approve creation of the county crime control district and adoption of the proposed local sales and use tax before that date for that district.

SECTION 4. (a) Subchapter C, Chapter 24, Government Code, is amended by adding Section 24.522 to read as follows:

Sec. 24.522. 377TH JUDICIAL DISTRICT (VICTORIA COUNTY). (a) The 377th Judicial District is composed of Victoria County.

(b) The 377th Judicial District shall give preference to criminal cases.

(b) This court is created on the date on which funding is available:

(1) through legislative appropriation; or

(2) through the provisions of Chapter 317, Government Code; or

(3) by the Victoria County Commissioners Court to cover judicial salary and all necessary court expenses, until necessary state funding is obtained.

SECTION 5. There is appropriated to the judiciary section of the comptroller's department, out of the General Revenue Fund, the amount necessary to provide funding for the judicial districts created by this Act in the same amounts provided for existing judicial districts by S.B. No. 222, the General Appropriations Act, for the 1990-1991 biennium.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

/s/ W P Hobby
President of the Senate

/s/ Gil Lewis
Speaker of the House

I hereby certify that S.B. No. 1379 passed the Senate on May 22, 1989, by a viva-voce vote; and that the Senate concurred in House amendments on May 28, 1989, by a

viva-voce vote; passed subject to the provisions of Article III, Section 49a, of the Constitution of Texas.

/s/ Betty King
Secretary of the Senate

I hereby certify that S.B. No. 1379 passed the House, with amendments, on May 27, 1989, by a non-record vote; passed subject to the provisions of Article III, Section 49a, of the Constitution of Texas.

/s/ Betty Murray
Chief Clerk of the House

Approved:

6-14-89
Date

/s/ W.P. Clements
Governor

I, Bob Bullock, Comptroller of Public Accounts, do hereby certify that the amounts appropriated in the herein S.B. No. 1379, Regular Session, 71st Legislature, are within the amount estimated to be available in the affected fund.
Certified June 6, 1989.

/s/ illegible
Comptroller of Public Accounts

3:30 p.m.
JUNE 1 1989
/s/ illegible
illegible

CAUSE NO. MO-90-CA-171
EXHIBIT 14 OF PLAINTIFF

JUDICIAL DISTRICTS – 200TH
AND 201ST DISTRICTS – CREATION

CHAPTER 525

S. B. NO.515

An Act amending Subchapter C, Chapter 23, Acts of the 61st Legislature, 2nd called Session, 1969, Judicial Districts Act of 1969 (Article 199a, Vernon's Texas Civil Statutes), by adding Section 3.029 providing for the creation of the 200th and 201st Judicial Districts to be composed of the County of Travis; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Subchapter C, Chapter 23, Acts of the 61st Legislature, 2nd Called Session, 1969, is amended by the addition[67] thereto of Section 3.029 which shall read as follows:

"Sec. 3.029. (a) The 200th and 201st Judicial Districts, each composed of the County of Travis, are hereby created.

"(b) The 200th Judicial District is created effective September 1, 1971.

"(c) The 201st Judicial District is created effective January 1, 1973."

Sec. 2. The importance of this legislation and the crowded condition of the calenders in both Houses create an emergency and an imperative public necessity that the

---

[67] Vernon's Ann.Civ.St. art. 199a. § 3.029.

Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the Rule is hereby suspended.

Passed the Senate on May 11, 1971, by a viva voce vote; passed the House on May 29, 1971, by a non-record vote.

Approved June 1, 1971.

Effective Aug. 30, 1971, 90 days after date of adjournment.

GOVERNMENT EXHIBIT I
MO-90-CA-07

(SEAL)
UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

December 6, 1990

I hereby certify that the annexed paper is a true copy of the original record which is in the official custody of the Department of Justice, to wit: Telefacsimile dated March 23, 1990 from Austin Bray, Assistant General Counsel, Elections Division, State of Texas to Carla Markim, an Equal Opportunity Specialist in Voting Section, U.S. Department of Justice.

In witness whereof, I have hereunto set my hand and caused the seal of the Department of Justice to be affixed on the day and year first above written.

/s/ Shirley Lloyd
Shirley Lloyd
Deputy Executive Officer
Civil Rights Division
Washington, D.C. 20530

(SEAL)

(SEAL)

Office of the Secretary of State

George S. Bayoud, Jr.
Secretary of State

Elections Division
Telecopier Cover Sheet

Date: 3/23/90 Time Sent: 2:20 PM.

TO: (Name) Ms. Carla Markin

(Agency/Company) D.O.J. – Voting Rts.

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IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL Austin Bray AT (512) 463-5650. THANK YOU.

CONSTITUTION OF THE STATE OF TEXAS 1876
Adopted February 15, 1876

Article — Page

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* * *

procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

The Court of Criminal Appeals may sit for the transaction of business at any time during the year and each term shall begin and end with each calendar year. The Court of Criminal Appeals shall appoint a clerk of the court who shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for a term of four years unless sooner removed by the court for good cause entered of record on the minutes of said court.

The Clerk of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall continue in office for the term of his appointment. (As amended Nov. 8, 1966, Nov. 8, 1977, and Nov. 4, 1980.)

Sec. 6. COURTS OF APPEALS; TRANSFER OF CASES; TERMS OF JUDGES. The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts,

which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law. Each Court of Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (As amended Aug. 11, 1891, Nov. 7, 1978, Nov. 4, 1980, and Nov. 5, 1985.)

Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY OR DISQUALIFICATION OF JUDGE. The State shall be divided into judicial districts with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer

or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding. (As amended Nov. 6, 1949, and Nov. 5, 1985.)

Sec. 7a. JUDICIAL DISTRICTS BOARD; REAPPORTIONMENT OF JUDICIAL DISTRICTS. (a) The Judicial Districts Board is created to reapportion the judicial districts authorized by Article V, Section 7, of this constitution.

(b) The membership of the board consists of the Chief Justice of the Texas Supreme Court who serves as chairman, the presiding judge of the Texas Court of Criminal Appeals, the presiding judge of each of the administrative judicial districts of the state, the president of the Texas Judicial Council, and one person who is licensed to

practice law in this state appointed by the governor with the advice and consent of the senate for a term of four years. In the event of a vacancy in the appointed membership, the vacancy is filled for the unexpired term in the same manner as the original appointment.

(c) A majority of the total membership of the board constitutes a quorum for the transaction of business. The adoption of a reapportionment order requires a majority vote of the total membership of the board.

(d) The reapportionment powers of the board shall be exercised in the interims between regular sessions of the legislature, except that a reapportionment may not be ordered by the board during an interim immediately following a regular session of the legislature in which a valid and subsisting statewide apportionment of judicial districts is enacted by the legislature. The board has other powers and duties as provided by the legislature and shall exercise its powers under the policies, rules, standards, and conditions, not inconsistent with this section, that the legislature provides.

(e) Unless the legislature enacts a statewide reapportionment of the judicial districts following each federal decennial census, the board shall convene not later than the first Monday of June of the third year following the year in which the federal decennial census is taken to make a statewide reapportionment of the districts. The board shall complete its work on the reapportionment and file its order with the secretary of state not later than August 31 of the same year. If the Judicial Districts Board fails to make a statewide apportionment by that (illegible) Legislative Redistricting Board established by Article

III, Section (illegible) constitution shall make a statewide reapportionment of the judicial districts not later than the 150th day after the final day for the Judicial Districts Board to make the reapportionment.

(f) In addition to the statewide reapportionment the board may reapportion the judicial districts of the state as the necessity for reapportionment appears by redesignating in one or more reapportionment orders, the county or counties that comprise the specific judicial districts affected by those reapportionment orders. In modifying any judicial district, no county having a population as large or larger than the population of the judicial district being reapportioned shall be added to the judicial district.

(g) Except as provided by Subsection (i) of this section, this section does not limit the power of the legislature to reapportion the judicial districts of the state, to increase the number of judicial districts, or to provide for consequent matters on reapportionment. The legislature may provide for the effect of a reapportionment made by the board on pending cases or the transfer of pending cases, for jurisdiction of a county court where county court jurisdiction has been vested by law in a district court affected by the reapportionment, for terms of the courts upon existing officers and their duties, and for all other matters affected by the reapportionment. The legislature may delegate any of these powers to the board. The legislature shall provide for the necessary expenses of the board.

(h) Any judicial reapportionment order adopted by the board must be approved by a record vote of the

majority of the membership of both the senate and house of representatives before such order can become effective and binding.

(j) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this section. Judicial districts small in size than the entire county may be created subsequent to a general election where a majority of the persons voting on the proposition adopt the proposition "to allow the division of ___ County into judicial districts composed of parts of ___ County." No redistricting plan may be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county. (Added Nov. 5, 1985.)

Sec. 8. JURISDICTION OF DISTRICT COURT. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on

* * *

JRD:GS:CM:lrj
DJ 166-012-3
Z7619
AA374-388

April 11, 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on February 13, 1990; supplemental information was received on March 23 and 28, 1990.

The information received on March 23, 1990 is necessary for a proper review of the instant changes under Section 5. Accordingly, by May 22, 1990, we will either make a final determination or request from you any specific items of additional information necessary to complete our review of your submission under Section 5. See

the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO. MO-90-CA-171
EXHIBIT 7 OF PLAINTIFFS

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

May 16, 1990

Ms. Sandra Coleman
Deputy Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Submission under Section 5, Voting Rights Act, of Senate Bill 1379, Chapter 632, 71st Legislature, 1989.

Dear Ms. Coleman:

Reference is made to your telephone conversation of today with Mr. Austin Bray of my staff. In that conversation, you stated that the Fifth Circuit has granted a motion for rehearing en banc of its decision in *League of United Latin American Citizens Council No. 4434 v. Clements*, No. 90-8014 (5th Cir. May 11, 1990) ("*LULAC*").

This letter is to request that you consider our submission of Senate Bill 1379 in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued.

Than [sic] you for your attention to my letter, and please feel free to contact me at (512/463-9871) or Mr. Bray at

(512/463-9861) should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/senate/mt

CAUSE NO. MO-90-CA-171
EXHIBIT 8 OF PLAINTIFFS

JRD:GS:CM:lrj
DJ 166-012-3
Z7619
AA374-388

MAY 18 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received additional supplemental information regarding this submission on May 15 and 16, 1990.

It is our understanding pursuant to a discussion between Austin Bray, an attorney on your staff, and Sandra Coleman, Deputy Chief of the Voting Section, that you request that the information you provided on May 15 and 16, 1990, supplement your submission and that you understand that this will extend the time for review under Section 5. Accordingly, by July 16, 1990, we will either make a final determination or request from you any specific items of additional information necessary to

complete our review of your submission. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO MO-90-CA-171
EXHIBIT 9 OF PLAINTIFFS

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

July 2, 1990

Mr. Barry Weinberg
Acting Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Withdrawal of submission under Section 5, Voting Rights Act, of Chapter 632, Senate Bill 1379, 71st Legislature, 1989.

Dear Mr. Weinberg:

Pursuant to 28 C.F.R. § 51.25 (1987), this letter is to advise you that the State of Texas is hereby withdrawing its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989. Our records indicate that you received this submission on February 13, 1990.

Prior to this withdrawal, the 60th day for your response to this submission was July 16, 1990. As you are aware, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments en banc on June 19, 1990, in the case of *League of United Latin American Citizens Council No. 4434 v. Clements*, No. 90-8014 (5th Cir., *argued en banc*, June 19, 1990). It is thus not certain whether the court will issue its opinion prior to July 16, 1990. Accordingly, we believe it is in the best interest of both the Justice Department and the State of Texas for us to withdraw this submission at this time.

Thank you for your attention to my letter, and please feel free to contact me at (512) 463-9871 should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH:ab:jm

CAUSE NO. MO-90-CA-171
EXHIBIT 10 OF PLAINTIFFS

JRD:GS:CM:gmh
DJ 166-012-3
Z7619
AA374-388

July 16, 1990

Tom Harrison, Esq.
Special Assistant for Elections
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on February 13, 1990; supplemental information was received on March 23, 28, and May 15, 1990.

On July 2, 1990, we received your letter of the same date withdrawing the instant submission. Accordingly, no determination by the Attorney General is necessary with regard to these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25). Should you

elect to resubmit this act at a later date it will not be necessary to resubmit material previously provided.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO. MO-90-CA-171
EXHIBIT 11 OF PLAINTIFF

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

October 1, 1990

Mr. J. Gerald Hebert
Acting Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Resubmission under Section 5, Voting Rights Act, of Chapter 632, Senate Bill 1379, 71st Legislature, 1989.

Your File Nos.: DJ 166-012-3
Z7619
AA374-388

EXPEDITED CONSIDERATION REQUESTED

Dear Mr. Hebert:

Reference is made to my telephone conversation of this date with Ms. Sandra Coleman of your staff and to your office's letter to me of July 16, 1990, which stated "Should you elect to resubmit this act at a later date it will not be necessary to resubmit material previously provided."

This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989. We would request, pursuant to 28 C.F.R. § 51.34 (1987), that our resubmission be given expedited consideration.

We would also request that you consider our resubmission of Senate Bill 1379 in accordance with the Fifth Circuit's recent holding in *League of United Latin American*

Citizens Council No. 4434 v. Clements, No. 90-8014 (5th Cir. Sept. 28, 1990) (en banc).

Thank you for your attention to my letter, and please feel free to contact me at (512) 463-9871 or toll-free at 1-800-252-8683 should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/ket

CAUSE NO. MO-90-CA-171
EXHIBIT 12 OF PLAINTIFFS

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

NOV 5 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 12060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on October 2, 1990.

We have given careful consideration to the information in your submission, including all information contained in your earlier submission of Chapter 632, which was withdrawn by the state pending a decision by the court *en banc* in *League of United Latin American Citizens v. Clements*, No. 90-8014 (5th Cir. Sept. 28, 1990) and we have considered the information in that opinion, as well as prior court opinions in that case. In addition, we have considered information from the Census, along with comments and information from other sources.

The changes consist of the establishment of fifteen additional district court judgeships, denominated as separate Judicial Districts. Each judgeship is elected at large in the area of the court's jurisdiction, which consists of one or more counties. Each judgeship is subject to the general requirement in Texas law that nomination for such position requires the obtaining of a majority of the vote in a political primary. Thirteen of these judgeships will have the same geographic jurisdiction as previously existing judgeships. In these cases, the election of judgeships by Judicial District operates as a numbered post requirement eliminating any possibility of effective single-shot voting.

Our review of the history of the numbered post feature in Texas elections indicates that its adoption and continued maintenance over the years appears calculated to place an additional limitation on the ability of minority voters to participate equally in the political process and elect candidates of their choice. In that regard, we note that it is commonly understood that numbered posts along with other features such as the use of a majority-vote requirement in the context of an at-large election system, have had a discriminatory impact on racial and ethnic minorities in those areas where minorities are a significant percentage of the population. Numerous federal court decisions have chronicled instances where these features have been adopted in Texas for clearly discriminatory motives, and where their use has produced the intended discriminatory effects. In addition, review of our records shows that the Attorney General has had to interpose objection under Section 5 on forty-one occasions to the adoption of numbered posts and on

twenty-six occasions to the adoption of a majority-vote requirement by various Texas jurisdictions.

A review of more recent materials shows that it is commonly understood among Texas legislators that the discriminatory impact of these features is present in the election of judges. Indeed, the legislative session which produced Chapter 632 (1989) included an address by the Chief Justice of the Texas Supreme Court and legislative committee discussions in which the discriminatory impact of these features was acknowledged. It appears that the proposed method of electing the judicial positions presently before us, which incorporates the very features understood to be discriminatory, took the form it did primarily because of the inability of legislators to reach a consensus regarding an alternative method of selecting judges that would be fair to racial and ethnic minorities.

Accordingly, with regard to the additional judgeships in Dallas, Lubbock, and Tarrant Counties in particular, the evidence clearly indicates that the at-large method of election, even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973c.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if

its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with numbered posts and majority vote results in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the voting changes occasioned by Chapter 632, S.B. No. 1379 (1989) and the implementation schedule for those districts.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens v. Clements*, No. 90-8014 (Sept. 28, 1990) ("*LULAC*") (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Seciton 5 of the Act applies to state judicial elections" (Slip. op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes to which we have objected continue to be legally unenforceable and should not be

implemented in the November 6, 1990, election. *Clark v. Roemer,* No. A-327 (U.S. Nov. 2, 1990) (copy attached). See also 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

JRD:GS:PM:lrj
DJ 166-012-3
AK742-743
AL623-636

NOV 20 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to our letter of November 5, 1990, in which the Attorney General interposed an objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional elected judgeships and the implementation schedule for the State of Texas. Since that time it has come to our attention that our determination in that regard may need clarification so that state authorities will have a clearer basis upon which to conform their actions to the requirements of Section 5.

As you know, Chapter 632 created or authorized the creation of fifteen judgeships in ten of the distinct geographical districts used for the election of judges in Texas. The Attorney General's determination was made with respect to the statute as a whole but focused on certain elements of the electoral scheme which raised the concerns which led to our interposing the objection. Of course, our findings with respect to the purpose and effect of a particular voting feature well may vary depending on the demographic and historical context in which the features's implementation relative to given

positions must be viewed. Thus, our consideration of each of the new judgeships contained in Chapter 632 in the light of these factors and in the context of existing racially polarized voting, along with the use of designated post and majority vote features, led us to conclude that the state had not met its burden under Section 5 of showing the absence of a discriminatory purpose with regard to a number of the new judgeships involved, namely, those in Dallas, Lubbock, Tarrant, and Victoria counties (i.e., Judicial Districts 363-364, and 371-377). In addition, we concluded that, even aside from the designated post and majority-vote features, the at-large election method for the additional judgeships in Dallas, Lubbock, and Tarrant Counties, produced discriminatory results proscribed by Section 2 of the Voting Rights Act, 42 U.S.C. 1973c, and our earlier letter expressly noted that these judgeships were not entitled to preclearance for this additional reason.

Consequently, while our letter does say, in broad terms, that the Attorney General's objection was interposed to "the voting changes occasioned by Chapter 632," the concerns that led to our objection involved only the additional judgeships noted above. Of course, it is within the province of state authorities to decide whether, under state law, the other provisions of Chapter 632 may be enforced in view of the Attorney General's decision, but we wish to make clear our view that there is no Section 5 bar to enforcement of the additional judgeships in Dimmit, Maverick, Zavala, Collin, Denton, Williamson, Anderson, Cherokee, and Hidalgo Counties (i.e., Judicial Districts 365-370).

If you have any questions regarding this matter, please call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

DEFENDANT'S EXHIBIT 16

(Seal of Texas)

The State of Texas

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached are TRUE AND CORRECT copies of;

1. Governor's Appointment Letter Dated August 27, 1971

2. Oath of Office Dated September 1, 1971

3. June 29, 1972 Senate Confirmation Notice

for Charles D. Mathews, Judge of the 200th Judicial District of Texas, as on file with this office.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 5th day of December, 1990.

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

DEFENDANT'S EXHIBIT 17

(Seal of Texas)

The State of Texas

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached are TRUE AND CORRECT copies of;

1. Governor's Appointment Letter Dated December 28, 1972

2. Oath of Office Dated January 1, 1973

3. March 22, 1973 Senate Confirmation Notice

for David S. McAngus, Judge of the 201st Judicial District of Texas, as on file with this office.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 5th day of December, 1990.

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

DEFENDANT'S EXHIBIT 15

THE STATE OF TEXAS

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of Texas, do hereby certify that the attached document contains true and correct returns for the primary and general elections held for the 200th and 201st District Courts in Travis County, Texas from 1972 and 1974, respectively.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this
5th *day of* December , *A.D. 19* 90 .

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

ELECTION RETURNS FOR THE 200th AND 201st DISTRICT COURTS

(*) = Incumbent appointee

NOTE: No Republican candidate for either judgeship has ever run in the primary or general elections.

200th DISTRICT COURT

Primary Election (Democratic)

1972 – Charles Mathews (*) – 60,068
J.H. "Buck" Smith – 23,416

1976 – Charles Mathews – 48,636

1980 – Charles Mathews – 30,285

1984 – Paul Davis – 36,056

1988 – Paul Davis – 50,589

General Election

Charles Mathews – 89,544

Charles Mathews – 101,266

Charles Mathews – 99,932

Paul Davis – 127,983

Paul Davis – 152,321

201st DISTRICT COURT

Primary Election (Democratic)

1974 –	Jerry Dellana	– 36,398
	David McAngus (*)	– 25,451
1978 –	Jerry Dellana	– 47,476
1982 –	Jerry Dellana	– 36,482
1986 –	Jerry Dellana	– 31,819
1990 –	Jerry Dellana	– 45,124

General Election

Jerry Dellana	– 56,395
Jerry Dellana	– 61,220
Jerry Dellana	– 85,944
Jerry Dellana	– 101,947
Jerry Dellana	– 128,924

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, et al., Plaintiffs, v. STATE OF TEXAS, Defendant, and FAITH JOHNSON, et al., Defendant-Intervenors.	Civil Action No. MO-90-CA-171
	FILED JAN 25 1991
	(Consolidated Cases)
UNITED STATES OF AMERICA, Plaintiff, v. STATE OF TEXAS; et al, Defendants.	Civil Action No. A-90-CA-1018

JUDGMENT

This cause, along with *Mexican American Bar Association of Texas v. State of Texas*, C.A. No. MO-90-CA-171 (W.D. Tex.), came for an evidentiary hearing pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. 1973c, on December 12, 1990, and the issues having been duly tried, and this Court having issued its Memorandum Opinion and Order on December 26, 1990, denying all

relief requested by plaintiffs under Section 5 of the Voting Rights Act;

It is hereby ORDERED, ADJUDGED, and DECREED that, pursuant to Rule 58, Federal Rules of Civil Procedure, JUDGMENT under Section 5 of the Voting Rights Act is entered for defendant State of Texas and against plaintiffs United States of America and Mexican American Bar Association of Texas, et al.

ENTERED this 25th day of January, 1991.

FOR THE THREE-JUDGE COURT

/s/ Lucius D. Bunton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et.al. Plaintiffs,	§	CIVIL ACTION #MO-90-CA-171
vs.	§	
THE STATE OF TEXAS Defendant	§	

PLAINTIFFS' AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT OF THE THREE JUDGE DECISION PURSUANT TO 42 USC 1973c

---

Notice is hereby given that Plaintiffs-Appellants Mexican American Bar Association (MABA) et. al., hereby appeal to the United States Supreme Court the three judges decision of December 26, 1990 and the judgement entered on January 25, 1991.

Respectfully submitted,

DATED: February 7, 1991

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By: /s/ Rolando L. Rios
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OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 1991, I served a copy of the United States' Amended Notice of Appeal by first class mail, postage prepaid, to the following counsel:

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Attorney for Plaintiffs

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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Deputy Solicitor General

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QUESTIONS PRESENTED

1. Whether the district court permissibly rejected the Attorney General's determination, in administering Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, that additional information materially supplemented a jurisdiction's submission of a voting change and thereby commenced anew the 60-day period during which the Attorney General may object to a voting change.

2. Whether a voting procedure was "in force or effect," within the meaning of Section 5 of the Voting Rights Act of 1965, on the date of coverage specified by the Voting Rights Act of 1965, if the procedure was enacted before the date of coverage but was not filled by general election until after the date of coverage.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1352

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion and order of the three-judge district court (J.S. App. 1-40) is unpublished.[1]

JURISDICTION

The judgment of the three-judge district court was entered on January 25, 1991 (J.S. App. 93), and appellants filed a notice of appeal on February 7, 1991 (J.S. App. 95) and a jurisdictional statement on February 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

[1] The district court consolidated a Section 5 complaint by the United States and a Section 5 complaint by appellants, and the court issued a single decision and judgment covering both cases. J.S. App. 1, 41, 93.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits changes affecting voting in covered jurisdictions unless a change is precleared by either the United States District Court for the District of Columbia or the Attorney General of the United States. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 33-34 (1978). More particularly, Section 5 bars covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" different from that "in force or effect" on a specified date (November 1, 1964, November 1, 1968, or November 1, 1972, depending on the date of coverage for the particular jurisdiction) until the jurisdiction either (1) has submitted the proposed change to the District Court for the District of Columbia and received a declaratory judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]," or (2) has submitted the change to the Attorney General and the Attorney General "has not interposed an objection within sixty days after such submission, or * * * affirmatively indicated that such objection will not be made."

The Attorney General has promulgated regulations to govern his administration of Section 5. See 28 C.F.R. 51 *et seq.* Section 51.39 of these regulations provides that, if the submitting authority provides documents and written information "materially supplementing" a submission, "the 60-day period for the original submission will be calculated from the

receipt of the supplementary information." 28 C.F.R. 51.39.[2]

In 1975, Texas became a covered jurisdiction under Section 5 of the Voting Rights Act of 1965. It thus cannot implement any "standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1972, until it has obtained preclearance. 40 Fed. Reg. 43,746 (1975).

2. a. In June 1989, the State of Texas enacted legislation creating 15 new elected state district court judgeships (Chapter 632, S.B. No. 1379 (1989)). On February 13, 1990, the State submitted the legislation (Chapter 632) to the Attorney General for review pursuant to Section 5.[3] The State's entire submission was a letter and a copy of Chapter 632. No information was submitted concerning the election method for district court judges or the way in which the judicial districts are structured. J.S. App. 47-56.

On March 23, 1990, during the pendency of the review process, state officials submitted by telefacsimile Sections 6, 7, and 7a of Article 5 of the Texas Constitution addressing—among other things—the method by which district court judgeships are apportioned, qualifications for judicial candidates, and the minimum geographic size of judicial districts. J.S.

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[2] The Attorney General has delegated his Section 5 preclearance authority to the Assistant Attorney General, Civil Rights Division. 28 C.F.R. 51.3. References in this brief to actions of the Attorney General include references to actions of the Assistant Attorney General, Civil Rights Division, acting on behalf of the Attorney General.

[3] The State's letter was dated February 8, 1990, and received on February 13, 1990. J.S. App. 47, 68, 74.

App. 59-67.[4] On April 11, 1990, prior to the expiration of the statutory 60-day review period, the Attorney General sent the State a letter informing officials that the "information received on March 23, 1990, is necessary for a proper review of the instant changes under Section 5," and that, pursuant to 28 C.F.R. 51.39, a preclearance determination would be made by May 22, 1990 (60 days from March 23, 1990). J.S. App. 68-69.

b. On May 16, 1990, six days before the expiration of the review period, the State sent the Attorney General a letter regarding its submission and certain court of appeals actions in *League of United Latin Am. Citizens Council No. 4434 (LULAC)* v. *Clements*, a Section 2 challenge to district judgeships in Texas. The letter observed that the *LULAC* panel decision (902 F.2d 293) had been issued five days previously,[5] and that the Fifth Circuit had ordered rehearing en banc (902 F.2d 322). The letter formally requested that the Attorney General "consider [the State's] submission in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued." J.S. App. 70. Two days later, on May 18, 1990, the Attorney General sent the State a letter noting the State's request that "the information [it] provided on May 15 and May 16, 1990, supplement [its] submission" and confirming that the State "understand[s] that this will extend the time for review under Section 5."

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[4] These provisions of the Texas Constitution had been precleared by the Attorney General by letter dated October 1, 1985. J.S. App. 9.

[5] The *LULAC* panel decision rejected the Section 2 challenge on the ground that Section 2(b) does not apply to elected trial judges in Texas. 902 F.2d at 308.

Id. at 72.[6] The letter then related that, pursuant to 28 C.F.R. 51.39, as a result of the supplemental information, the Attorney General's preclearance determination would be made by July 16, 1990. J.S. App. 72-73.

On July 2, 1990, prior to the expiration of the second recalculated 60-day period, the State sent the Justice Department a letter advising that the State was withdrawing its submission of Chapter 632. The letter reiterated that, prior to the withdrawal, the sixtieth day for the Attorney General's preclearance decision was July 16, 1990. The State's letter explained that the submission was being withdrawn because the State was not certain whether the Fifth Circuit would issue the en banc decision in *LULAC* prior to July 16, 1990. J.S. App. 74-75.[7]

On July 16, 1990, the Justice Department sent a letter to the state officials informing them that it had received the letter withdrawing the submission, and that, as a result, no determination by the Attorney General was necessary. J.S. App. 76.

c. On October 1, 1990, three days after the en banc decision in *LULAC*, the State resubmitted the legislation for review under Section 5. J.S. App. 78-79.[8]

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[6] On May 15, 1990, the Attorney General received from the State a copy of the *LULAC* panel decision.

[7] The letter stated that the submission was being withdrawn pursuant to 28 C.F.R. 51.25. J.S. App. 74. This regulation provides that "[a] jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General."

[8] In *LULAC*, the en banc court held that the Section 2 results test does not apply to judges because they are not "representatives" within Section 2(b) of the Act. 914 F.2d 620, cert. granted *sub nom. Houston Lawyers Ass'n* v. *Attorney General of Texas* and *LULAC* v. *Attorney General of Texas*, Nos. 90-813 and 90-974, 111 S.Ct. 775 (1991) (to be

On November 5, 1990, the Attorney General interposed a Section 5 objection to the changes embodied in Chapter 632. J.S. App. 80-84. The objection letter stated that the method of election for the new judgeships would produce a discriminatory result proscribed under Section 2 of the Act. J.S. App. 82. The objection letter also stated that the State had not met its burden of proving the absence of discriminatory purpose in the submitted changes. *Id.* at 82-83; see also *id.* at 86. The letter noted that, in *LULAC*, the Fifth Circuit had held that "the Section 2 results standard is not applicable to judicial elections," but that the court had also held that Section 5 " 'applies to judicial elections' "; the letter concluded that "until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2." J.S. App. 83. The letter thus advised the State that, unless and until it received a contrary declaratory judgment from the District Court for the District of Columbia or a reconsideration by the Attorney General, the proposed changes were "legally unenforceable and should not be implemented in the November 6, 1990 election." *Id.* at 83-84.[9]

d. Notwithstanding the Attorney General's objection, the State conducted elections on November 6, 1990, for all of the additional judgeships up for election, including five judgeships to which a Section 5 objection had been interposed. See J.S. App. 7 n.1.

---

argued on April 22, 1991). The Section 5 issues in this case are distinct from the Section 2 issue in *LULAC*. See note 23, *infra*.

[9] On November 20, 1990, the Attorney General sent the State a letter clarifying that his objection was to nine of the 15 new judgeships (in Dallas, Lubbock, Tarrant, and Victoria Counties). J.S. App. 85-87.

3. On October 26, 1990—prior to the Attorney General's objection—appellants filed a Section 5 enforcement action against the State of Texas, seeking to enjoin elections in the judgeships created by Chapter 632 because they had not been precleared pursuant to Section 5. J.S. App. 3. Appellants also sought to enjoin elections in two judgeships in Travis County created by legislation in 1971 (but not filled by election until after November 1, 1972) that had not been precleared. *Id.* at 3, 5. The effective date of one of the judgeships (District 201) was after November 1, 1972, and the effective date of the other (District 200) was before November 1, 1972. *Id.* at 4.

On November 27, 1990, the United States also filed a Section 5 enforcement action against Texas, seeking to enjoin the State from continuing to implement the voting changes embodied in Chapter 632 that were the subject of the Attorney General's Section 5 objection. J.S. App. 3. The United States' complaint did not address the Travis County judgeships. The United States' suit and appellants' suit were subsequently consolidated. *Id.* at 41.

On November 30, 1990, the State filed its answer to the United States' complaint and asserted, among other things, that the judgeships created by Chapter 632 had been preclared by operation of law because the Attorney General had "failed to act within either sixty days of Texas's submission or sixty days of any material supplementary submission as described in 28 C.F.R. § 51.39." State Ans. 1-2. This filing, along with the State's response to appellants' complaint, marked the first time the State contended that its two additional submissions did not constitute information "materially supplementing" the initial submission within the meaning of 28 C.F.R. 51.39.

4. On December 26, 1990, the court issued its Memorandum Opinion and Order. J.S. App. 1. By a 2-1 vote, the court held that, contrary to the Attorney General's contemporaneous determinations and notice to the State, the State's submission of the Texas Constitution provisions and of the *LULAC* letter did not materially supplement the State's original submission, and thus did not permit re-calculation of the 60-day review period. *Id.* at 10. As a result and despite the State's own resubmission of Chapter 632 on October 1, 1990, the judgeships turned out to have been precleared by the Attorney General's failure to act within sixty days of the State's earlier submission —either on April 16, 1990 (sixty days after the initial submission) or, in the alternative, on May 22, 1990 (sixty days after the submission of the sections of the Texas Constitution). *Id.* at 12-13.

With respect to the sections of the Texas Constitution, the court stated that the information was not "supplemental" because it was readily available in a law library and because the Attorney General had precleared the transmitted sections. The court also held that the information was not material because, according to the court, it could not possibly have affected "the outcome" of the Attorney General's decision. J.S. App. 10-11.[10] With respect to the *LULAC* letter, the court stated that that information was

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[10] The court also held, with respect to the sections of the Texas Constitution, that the time could not have been extended pursuant to 28 C.F.R. 51.37(a), a provision governing the Attorney General's request for additional information. J.S. App. 11. The court stated that although it was unclear whether the Attorney General in fact requested the information, even if he did so, the regulation was not applicable because it states that the request shall be made "by letter," and in this case there was only a telephone call. *Ibid.*

neither supplemental nor material because the Justice Department was aware of the case and had participated in it. *Id.* at 11-12. The court also observed that the *LULAC* letter could not have been material because the Attorney General ultimately objected to Chapter 632 despite the en banc *LULAC* decision holding that Section 2 does not apply to the election of judges. J.S. App. 12-13.[11]

Judge Bunton dissented from the majority's holding that the Chapter 632 judgeships were precleared by operation of law. J.S. App. 17-40. He concluded that the additional materials extended the objection deadline, and he emphasized that the State had recognized in its correspondence that the deadline had been extended. *Id.* at 21-23, 33-35.[12]

THE QUESTIONS ARE SUBSTANTIAL

In our view, the Attorney General's determinations under 28 C.F.R. 51.39 that additional information materially supplements a submission, and thereby extends the time during which the Attorney General may object to the change, is not reviewable. We did not, however, explicitly argue non-reviewabil-

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[11] With respect to the Travis County judgeships challenged by appellants, the court held that, since the legislation creating the two judgeships was enacted prior to the date Texas became covered under the Voting Rights Act, the judgeships were not subject to Section 5 preclearance. J.S. App. 4-6. The court stated that "the date of enactment, rather than the dates of the first elections for the respective two courts, is the appropriate date by which to determine applicability of section 5." *Id.* at 6.

[12] Judge Bunton agreed with the majority that the Travis County judgeships did not require preclearance. J.S. App. 17, 29.

ity to the district court,[13] and for that reason have not filed our own Jurisdictional Statement. See *Air Courier Conf.* v. *American Postal Workers Union*, No. 89-1416 (Feb. 26, 1991), slip op. 5 & n.3.

Nevertheless, even assuming *arguendo* that the Attorney General's determinations are reviewable, the district court seriously erred. To the extent that the Attorney General's determinations are reviewable, they are entitled to substantial deference; the district court's failure to accord any deference to the determinations was a clear error warranting summary reversal and remand to the district court for further consideration. In the event of such a remand, we would present the non-reviewability issue to the district court, and we therefore discuss it here solely to ensure a full understanding of the issue presented.

1. A conclusion that the Attorney General's determinations under 28 C.F.R. 51.39 are not reviewable comports with the purposes and structure of Section 5 and with prior decisions of this Court. Furthermore, serious practical problems will result if the Attorney General's determinations in this context are reviewable.

a. As this Court has recognized, permitting a covered jurisdiction to submit a change to the Attorney General was intended "to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions," since litigation might "unduly delay the implementation of validly enacted, nondis-

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[13] The United States' only discussion of the "materially supplementing" issue was at the district court hearing, which was held approximately two weeks after the filing of the United States' complaint; that hearing also included extensive testimony by various judges, and much of the discussion focused on other issues, such as the appropriate remedy for the claimed Section 5 violation. See, *e.g.*, Tr. 62-144, 150-156.

criminatory state legislation." *Morris* v. *Gressette*, 432 U.S. 491, 503-504 (1977). At the same time, however, "[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Georgia* v. *United States*, 411 U.S. 526, 540 (1973).[14] As a result, this Court has recognized that "the purposes of the Act are furthered if, once *all* information relevant to a submission is placed before the Attorney General, the Attorney General is accorded the full 60-day period provided by law in which to make his 'difficult and complex' decision." *City of Rome* v. *United States*, 446 U.S. 156, 171 (1980). Otherwise, if additional information were received without adequate time for review, the Attorney General might be forced either to make a response based on an inadequate review of the submission or simply to object to it. See *Georgia* v. *United States*, 411 U.S. at 540-541.[15]

b. In view of the purposes of Section 5, and, more particularly, the alternative administrative preclearance process, this Court has held that the Attorney General's discretionary decisions in administering Section 5 are not reviewable. In *Morris* v. *Gressette*,

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[14] Indeed, many of the submissions the Attorney General receives are "bare bones," and do not comply with the required contents for a submission set forth in 28 C.F.R. 51.27.

[15] In *Georgia* v. *United States*, 411 U.S. at 539-541, this Court held that the 60-day period for review of submission may recommence upon the Attorney General's receipt of additional information that he requested; in *City of Rome*, 446 U.S. at 170-172, the Court held that the 60-day period for review of reconsideration requests, established by regulation, may recommence upon the receipt of additional information submitted by the jurisdiction.

supra, the Court held that the Attorney General's failure to object to a submission was not reviewable. 432 U.S. at 504-507. Although the Act does not expressly preclude judicial review, the Court concluded that non-reviewability can be inferred from the role of the Attorney General's preclearance procedure in the overall statutory structure. *Id.* at 501. The Court emphasized that the Attorney General's failure to object is not conclusive with respect to the validity of the submitted legislation, because the legislation can nevertheless be challenged in a private enforcement action, and that judicial review would necessarily extend what was intended to be an expeditious process. *Id.* at 504-506.

More generally, the Court explained that "[t]he nature of the § 5 remedy * * * strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." *Morris* v. *Gressette*, 432 U.S. at 501. See also *id.* at 507 n.24 ("[W]e think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act."). Pursuant to *Morris* v. *Gressette*, lower courts have held that various discretionary decisions in the Attorney General's administration of Section 5 are not reviewable.[16]

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[16] See *Harris* v. *Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977) (Attorney General's decision to withdraw a Section 5 objection is not reviewable); *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (Attorney General's decision to limit his objection to one annexation when four annexations were submitted as a "package" is not reviewable), aff'd mem., 456 U.S. 1002 (1982); *City of Rome* v. *United States*, 472 F. Supp. 221, 234 n.64 (D.D.C. 1979) (Attorney General's determination that he required additional time to consider supplemental information in a recon-

Since Congress has vested in the Attorney General discretion to object or preclear a voting change, it follows that the Attorney General also has discretion to determine what information he needs to make an assessment of the change. And, since authority to determine materiality and supplementation is directly derivative of the authority to preclear or object, decisions on materiality and supplementation should be equally unreviewable. Such a rule effectuates the twin goals of affording a submitting jurisdiction an informed and expeditious decision, *Morris* v. *Gressette*,

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sideration request is not reviewable), aff'd on other grounds, 446 U.S. 156 (1980); *City of Rome* v. *United States*, 450 F. Supp. 378, 381 (D.D.C. 1978) (Attorney General's decision not to use formal hearings in Section 5 determinations is not reviewable), aff'd on other grounds, 446 U.S. 156 (1980). See also *Leroy* v. *City of Houston*, 831 F.2d 576, 580 (5th Cir. 1987) (noting, in attorney's fees context, that "[a]dministrative pre-clearance activities [under Section 5] are excluded from direct judicial review because speedy, definitive oversight of local election procedures, required by the statute, could not be achieved by allowing judicial review"), cert. denied, 486 U.S. 1008 (1988). In the only decision directly addressing the Attorney General's determination that additional information materially supplemented a State's submission, the district court found it unnecessary to reach the reviewability issue because the court concluded that the information was a material supplementation. *Lucas* v. *Bolivar County*, 567 F. Supp. 433, 436-437 (N.D. Miss. 1983).

In *Briscoe* v. *Bell*, 432 U.S. 404 (1977), decided the same day as *Morris* v. *Gressette*, this Court held that the Attorney General's determination under Section 4(b) of the Act that a jurisdiction is covered by the Act is not reviewable. The Court primarily relied on the specific nonreviewability provision of Section 4(b), but also noted "[t]he significant part played by the discretionary authority of the Attorney General in administering the Act * * * underlined by *Morris* v. *Gressette*." 432 U.S. at 412.

supra, and ensuring that the Attorney General's decision is based on complete information, *Georgia* v. *United States*, *supra*. As this Court noted in *Morris* v. *Gressette*, 432 U.S. at 505 n.21, a submitting jurisdiction that is dissatisfied with the decision of the Attorney General may seek declaratory relief in the District Court for the District of Columbia; it may not, however, obtain judicial review of the Attorney General's discretionary determinations.[17]

c. If the courts were permitted to review the Attorney General's decision that information is supplemental and material, the administrative preclearance process would be seriously undermined. The Attorney General could never be certain (at least until it was too late) that he actually had the time he thought he had to review a submission. As a result, to ensure that a court could not later find that the submission was precleared by operation of law because the review period expired prior to the objection, the At-

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[17] This is not to say, of course, that all review of all Section 5 issues is precluded. Review is unavailable for the Attorney General's discretionary determinations within his statutory authority; review is available, however, for issues concerning statutory requirements and non-discretionary duties. Courts thus may appropriately review (1) whether the requirements of Section 5 have been met with respect to a particular change (*e.g.*, whether a change was subject to Section 5 and whether the change was precleared, see *McCain* v. *Lybrand*, 465 U.S. 236, 250 n.17 (1984)); (2) whether the Attorney General's actions are consistent with the statute (*e.g.*, whether his regulations comport with the statute, see *Georgia* v. *United States*, 411 U.S. at 536); and (3) whether the Attorney General has discharged a non-discretionary duty imposed by statute or regulation (*e.g.*, whether the Attorney General's request for additional information, suspending the 60-day review period until the submission of the information, was by letter, as required by 28 C.F.R. 51.37).

torney General might be compelled, in all but the clearest cases, to assume that the receipt of supplementary information did not extend the review period. This might force the Attorney General either to ignore the supplementary information in making his decision (*e.g.*, because he did not have the time to analyze it), or to object to the submission.[18] As noted, in analogous circumstances, the Court has recognized that "[s]uch a result would run counter to the purposes of the Act and regulations, since it would penalize submitting jurisdictions that have legitimate reasons to file supplemental materials" and "would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion." *City of Rome* v. *United States*, 446 U.S. at 171-172.

Finally, precluding judicial review of the Attorney General's decision that information materially supplements a submission (and thus extends the review period) does not permit the Attorney General to postpone endlessly the running of the 60-day review period, and thus does not implicate the concerns addressed in *Garcia* v. *Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), aff'd mem., 439 U.S. 1059 (1979). In that case, the district court held, in interpreting the Attorney General's regulations, that the Attorney General can suspend the running of the 60-day period only once by requesting additional information, in part because the Attorney General could otherwise "drag[] out" the review period. 455 F. Supp. at 104-106. If a submitting authority does not

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[18] Cf. 28 C.F.R. 51.52(c) ("An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.").

want to extend the time for the Attorney General's decision under 28 C.F.R. 51.39, however, it can refrain from submitting supplemental information (or make certain that its initial submission is complete). Thus, under 28 C.F.R. 51.39, the submitting authority, and not the Attorney General, has the ultimate control over whether the review process will be repeatedly extended.[19]

2. Even if the Attorney General's exercise of discretion under 28 C.F.R. 51.39 is reviewable, the discretionary determination is entitled to considerable deference, and the district court erred in failing to defer to the Attorney General's determinations.

a. If the issue is reviewable at all, a reviewing court should give great deference to the Attorney General's determination that information was material and supplementary to a submission. It is well established that an agency's interpretation of its own regulations must prevail unless it is "plainly erroneous or inconsistent with the regulation," [20] and this principle of deference is fully applicable to the

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[19] Indeed, judicial review of the Attorney General's determination under 28 C.F.R. 51.39 might permit a submitting authority to manipulate the Section 5 process in an unacceptable manner. For example, a jurisdiction could repeatedly supplement its original submission in an attempt to persuade the Attorney General to preclear the voting change. If the Attorney General objected, the jurisdiction could seek to overturn that objection by arguing that the supplemental information was not material to the submission and thus did not extend the time for the Attorney General's objection.

[20] *E.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See also *Martin* v. *OSHRC*, No. 89-1541 (Mar. 20, 1991), slip op. 5; *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986).

Attorney General's interpretation of the Voting Rights Act regulations.[21] In stark contrast to this settled requirement, the district court did not even mention, much less apply, any obligation of deference. Instead, the district court essentially reviewed the Attorney General's determination de novo—a clear error.

In this particular context, moreover, there is even more reason than usual to give broad deference to the promulgating entity's interpretations of its regulations. Since the Attorney General ultimately determines, based on his review of the submitted information, whether to object to the submission, he is in the best position to know what information is material to *his determination* and whether new information is supplemental to the submission. The Attorney General's role in the administrative preclearance process thus further confirms the need for considerable deference to his conclusions about the materiality and supplementation of additional information.

b. Applying appropriate principles of deference, it is clear that the district court erroneously rejected the Attorney General's determinations.

First, the Attorney General reasonably concluded that the provisions of the Texas Constitution were material and supplemental to the State's submission. The State's submission sought preclearance of the creation of additional district court judgeships. The initial submission, however, did not contain information concerning the way in which the judicial districts are or can be structured under state law. This information—contained in the provisions of the Texas Constitution—was necessary to complete the Attor-

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[21] See, *e.g.*, *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982).

ney General's factual understanding of the judicial districting scheme. It was also necessary to his consideration of whether alternative methods of structuring the judicial districts were possible that might result in a less discriminatory effect on racial and ethnic minorities, and therefore whether the availability of such methods was probative of a discriminatory purpose.

The district court incorrectly rejected the Attorney General's determination. The court concluded that the provisions were not material because, in its view, "[t]here is no respect in which * * * [the information] possibly could have 'affected the outcome' of the submission." J.S. App. 10. As an initial matter, the Attorney General is in a far better position than the court to make that determination, and, as discussed above, the provisions might well have affected the outcome. But, in any event, the court misconstrued the nature of the materiality inquiry under this regulation. The materiality inquiry in this context focuses on the relationship of additional information to the Attorney General's analysis of the submission, not simply on its relationship to the end result or "outcome." In other words, the proper inquiry is whether the information aids the Attorney General's complete understanding of the submitted voting change and his determination whether the change has a discriminatory purpose or effect. The Attorney General may consider a wide range of information that completes his understanding of the submission, but that might not ultimately affect his preclearance decision. Thus, the district court not only improperly substituted its judgment for the Attorney General's, but also adopted an unduly narrow interpretation of the pertinent regulatory term.

With respect to supplementation, the district court concluded that the Texas Constitution provisions were not supplemental because they were readily accessible to the Attorney General and because the Attorney General had precleared the provisions five years previously. J.S. App. 10-11. In addition to the fact that, here, too, the Attorney General is in a far better position to evaluate supplementation than the district court, the district court's interpretation is incorrect. A submission is supplemented if a jurisdiction submits information that adds to the information the Attorney General received in the original submission (or in other supplementary submissions). Since the Attorney General receives thousands of Section 5 submissions each year,[22] it would be unreasonable simply to presume that the Attorney General has constructive knowledge of all information contained in previous submissions or in the Department of Justice law library, or that is otherwise available to the Attorney General. Moreover, it is clearly the submitting jurisdiction's burden to provide the Attorney General with complete information on which he can base a decision. See *Georgia* v. *United States*, 411 U.S. at 536-539. Finally, implicit in any supplemental submission is an argument that the material sent bears on the legality of the proposed changes; thus, even where the material may have already been available to the Attorney General, it will require additional analysis to evaluate the merits of the ar-

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[22] For example, in the years 1986-1990, the Attorney General had to review an average of over 17,000 changes encompassed in over 3,500 submissions each year under Section 5. Those numbers can be expected to increase in the next several years, as electoral changes are made in response to the 1990 census.

gument that the material supports the change's legality. Thus, on this issue as well, the district court had no basis for rejecting the Attorney General's conclusion.

Second, the Attorney General also reasonably determined that the State's letter formally requesting that he consider the submission in light of the panel decision and the anticipated en banc decision in *LULAC* also materially supplemented the State's submission. The district court held that the request was neither material nor supplemental because the Justice Department was well aware of the *LULAC* litigation. J.S. App. 11-12. But the court's conclusion misses the point. Voting rights litigation is frequently pending, and the Attorney General must make preclearance decisions despite that pendency. The significance of the State's letter was its formal request that the submission be considered, not simply with *LULAC* pending, but "in conjunction with the en banc opinion that will be issued." J.S. App. 70. This request was obviously supplemental because it added information to the submission. And the request was material because it added a significant element to the State's submission—a formal request, six days before the end of the 60-day review period, that the Attorney General consider the submission in light of an en banc opinion that had not been issued and for which the order of en banc review had been issued on that very day. See 902 F.2d 322 (5th Cir. 1990). Indeed, the en banc decision was so material to the State's submission that the State eventually withdrew the submission and did not re-submit it until after the en banc decision was issued. J.S. App. 74, 78.

The district court also suggested that the State's *LULAC* letter was not material because the Attorney

General ultimately objected to the submission after the decision. This suggestion is untenable. The determination that information is material is made when the information is received, not in retrospect after a final decision. Furthermore, a decision of materiality does not pre-ordain the Attorney General's ultimate preclearance decision. And, although a determination of materiality should not be limited to an analysis of the Attorney General's subsequent preclearance letter, the Attorney General clearly did give careful consideration to the *LULAC* decision in his preclearance objection. J.S. App. 83.[23]

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[23] Most of the judgeships at issue here are also at issue in *LULAC* (the judgeships in Dallas, Lubbock, and Tarrant Counties). The Section 5 issues in this case, however, are distinct from the Section 2 issue in *Houston Lawyers Ass'n*, No. 90-813, and *LULAC*, No. 90-975. The issue in those cases is whether the results test in Section 2(b) is inapplicable to district judgeships in Texas, either because judges are not "representatives" within the meaning of that term in Section 2(b) (as the en banc court held) or because the district judgeships are single person offices (as the court of appeals panel held). The term "representatives" does not appear in Section 5, and, as the en banc *LULAC* court recognized, judicial elections are within the scope of Section 5. 914 F.2d at 629. To be sure, if this Court agrees with the en banc *LULAC* court (or with the panel), it would clearly affect the basis for the Attorney General's results objection, but the proper vehicle for raising that issue would be a request for reconsideration pursuant to 28 C.F.R. 51.45 (or a declaratory judgment action), not a decision to ignore the Attorney General's Section 5 objection. Additionally, in this case, the Attorney General raised a purpose objection as well as a results objection (J.S. App. 82-83, 86), and the *Houston Lawyers Ass'n/ LULAC* cases concern only the results test.

We note that the district court criticized the Attorney General for, in its view, failing to heed the *LULAC* decision. J.S. App. 13-15. The Attorney General's action was entirely

3. Appellants also contend that the district court erred with respect to the applicability of Section 5 to the Travis County judgeships. J.S. 14-16. Although the United States did not challenge those judgeships in our complaint, we commented on the issue briefly at the district court hearing. We believe that one of the judgeships (District 201) was subject to Section 5 preclearance requirements because, although the legislation was enacted before November 1, 1972, the legislation expressly provided that its effective date was January 1, 1973. J.S. App. 4. Thus, it was not "in force or effect" on November 1, 1972 within the meaning of Section 5. See *Perkins* v. *Matthews*, 400 U.S. 379, 394 (1971) (Section 5's "reference to the procedure 'in force or effect on [the coverage date],' must be taken to mean the procedure that would have been followed if the election had been held on that date."); *City of Lockhart* v. *United States*, 460 U.S. 125, 132 (1983) (in determining whether a change must be precleared, the proper comparison is between the new system and the system "actually in effect" on the coverage date).[24] The other judgeship (District 200), however, was not subject to preclearance because its effective date was before November 1, 1972. J.S. App. 4. In other

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proper, however—the Attorney General was faced with a 60-day review period, imminent elections, and the strong likelihood of further appellate review of the *LULAC* holding, factors which counselled strongly against a failure to object (and preclearance of the change) based solely on the court of appeals' holding in *LULAC*. Furthermore, as noted above but not mentioned by the district court, the Attorney General's objection included a discriminatory purpose objection, a subject not at issue in *LULAC*.

[24] The district court did not consider the significance of the effective date; it considered only the date of enactment and

words, we believe that the appropriate date for determining Section 5 applicability is not the date of enactment (as the district court held, *id.* at 6) and not the date of election (as appellants contend) but rather the effective date for the particular offices at issue.[25]

CONCLUSION

With respect to the Chapter 632 judgeships, the judgment of the district court should be reversed and remanded for further proceedings. With respect to the Travis County judgeships, the judgment of the district court should be reversed with respect to District 201 and affirmed with respect to District 200.

Respectfully submitted.

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APRIL 1991

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the date on which elections were held. It might therefore also be appropriate to remand to the district court for further consideration of this issue as well.

[25] The district court incorrectly stated that the United States and the Attorney General supported appellants on both judgeships. J.S. App. 3. See Tr. 158-159.

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No. 90-1352

In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,

Appellants,

v.

THE STATE OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS, TO AFFIRM, OR TO AFFIRM AND DISMISS OF APPELLEE STATE DISTRICT JUDGE JERRY DELLANA

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QUESTION PRESENTED

Does Section 5 of the Voting Rights Act require preclearance of elected judgeships created by a statute enacted prior to the effective date of the Act as to Texas, simply because first elections for those judgeships were scheduled **after** the effective date of the Act as to Texas?

PARTIES

The parties in the court below are correctly stated in the Jurisdictional Statement of Appellants Mexican American Bar Association, et al.

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On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS, TO AFFIRM, OR TO AFFIRM AND DISMISS OF APPELLEE STATE DISTRICT JUDGE JERRY DELLANA

In 1971 the Texas Legislature enacted a statute creating the 200th and 201st District Courts of Travis County, Texas. The statute became effective on August 30, 1971. The first judge of the 201st District Court was appointed, pursuant to the statute, in 1973. The first election was held in 1974, and was won by Jerry Dellana. He took office in 1975 and has been regularly re-elected to the present time.

The Voting Rights Act was not extended to encompass changes in voting procedures in Texas until August 6, 1975, retroactive to an effective date of November 1, 1972. The state statute which created the two Travis County judgeships in issue had been in effect for more than one year before the effective date and has remained unchanged since that time. It has never been submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. For reasons set forth below, it is submitted that as to the two Travis County judgeships created in 1971, such preclearance was not required. Accordingly, no substantial federal question is presented and the case should be dismissed, affirmed, or both affirmed and dismissed.

OPINION BELOW

The three-judge district court below unanimously held that the two judicial positions created by the 1971 Texas statute did not require preclearance under the Voting Rights Act. [Appendix to Appellant's Jurisdictional Statement, p. 1-40.][1]

JURISDICTION

While the court has jurisdiction of appeals from three-judge district courts under 28 U.S.C. Section 1252

[1] In this Motion the reference "[App. ___]" refers to the appropriate page in the Appendix provided with Appellant's Jurisdictional Statement.

and 42 U.S.C. Section 1973c, the court should not exercise its jurisdiction in this case because, as to the state statute in question, no substantial federal question is presented.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

STATEMENT OF THE CASE

INTRODUCTION AND FACTUAL HISTORY

On June 1, 1971, the Texas Legislature enacted S.B. 515, a statute creating the 200th and 201st District Courts of Travis County, Texas.[2] S.B. 515 became effective on August 30, 1971 [App. 57-58]. In 1975 the Voting Rights Act was extended to cover Texas, and given retroactive effect to November 1, 1972 [App. 44]. Thus, the Texas statute which created the two Travis County judgeships had been in effect for more than one year before the determinative date. It has remained unchanged since that time. The 200th District Court was created September 1, 1971, and the 201st was created effective January 1, 1973 [App. 4]. Elections for the 200th District Court first occurred in 1972 and for the 201st District Court first occurred in 1974 [App. 91-92]. State District Judge Jerry Dellana was first elected in 1974, and by subsequent elections has held the office ever since [App. 92].

[2] For purposes of analysis herein, these judgeships are referred to hereinafter as the "Travis County Judgeships."

S.B. 515 was never submitted for preclearance under either of the routes set forth in Section 5 of the Voting Rights Act, nor until this suit had anyone ever suggested that preclearance was required.[3]

Although the three-judge court below was divided on other issues in the case, it was unanimous in holding that Section 5 of the Voting Rights Act did not apply to S.B. 515. Chief Judge Bunton, who dissented from the majority opinion on other issues, agreed with the majority that Section 5 did not apply to the Texas statute enacted prior to November 1, 1972 [App. 17].

The position of Appellee State District Judge Jerry Dellana, like that of the unanimous court below, is that because S.B. 515 had been in effect for more than four years before the Voting Rights Act was extended to cover the State of Texas and more than one year prior to the effective date of Section 5's applicability to the State of Texas, preclearance was (and is) not required under the clear language of the Voting Rights Act.

SUMMARY OF ARGUMENT: THE QUESTION IS NOT SUBSTANTIAL

As to S.B. 515 which created the Travis County judgeships, the question presented in this case is quite narrow:

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[3] While the Appellants point out that the States' attorneys could not explain an 8-month delay in submitting the 1989 state statute, (Appellant's Jurisdictional Statement, p. 3 at n. 1), they fail to offer any explanation here, as they did in the court below, for why Appellants waited nineteen years to claim that S.B. 515 triggered Section 5 preclearance.

whether Section 5 preclearance must be obtained for judicial positions created by a statute enacted **prior to** the effective date of the Act, but which provided for elections to those positions **after** the effective date of the Act.

The question raises an issue which applies only to a narrow band of statutes which were **enacted** prior to the effective date of the Voting Rights Act as to the various covered jurisdictions (whether under the 1965 Act, the 1975 extension, or any other or future extension), but which established elections which first occur *after* the effective date. The issue is distinguishable from the more commonplace multitude of enactments passed after the effective date of coverage under the Voting Rights Act, where preclearance of any change would clearly be required.

The answer to this question is settled law by at least two opinions of this Court. Those decisions indicate that the date of enactment is the critical date for Section 5 analysis. This rule is entirely consistent with the congressional intent in enacting and extending Section 5 of the Voting Rights Act. Accordingly, based upon the absence of a significant issue, and because the issue has already been decided by prior opinions of this Court, intervenor urges the Court to dismiss, affirm, or affirm and dismiss, this cause.

ARGUMENT AND AUTHORITIES

I. ELECTIVE JUDGESHIPS CREATED BY STATE STATUTE ENACTED PRIOR TO THE EFFECTIVE DATE OF THE VOTING RIGHTS ACT NEED NOT BE PRECLEARED PURSUANT TO SECTION 5, DESPITE THE FACT THAT THE FIRST ELECTIONS TO FILL THOSE JUDGESHIPS WERE SCHEDULED TO BE HELD AFTER THE ACT WAS EFFECTIVE AS TO TEXAS.

A. The language of Section 5 does not reach enactments prior to November 1, 1972.

Section 5 of the Voting Rights Act [App. 44 et. seq.] requires the State to obtain preclearance if it seeks to "enact or seek to administer any voting . . . procedure with respect to voting different from that in force or effect on November 1, 1972." [App. 44] This requires an inquiry into any "changes"[4] from prior election procedures, and leads to the further inquiry into the voting system to be used as the proper base for comparison. In this case, the comparison must be between the voting procedure "in force or effect" on the statutory date for comparison, i.e., November 1, 1972, and the voting procedure which the state has implemented pursuant to S.B. 515. In order to do a comparison, then, it is necessary to determine first what system was "in force or effect on November 1, 1972." [App. 44] Prior to November 1, 1972, the system in force in Texas was a statute mandating elections for the

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[4] The proper focus is on "changes," as demonstrated by the regulations promulgated by the Attorney General to govern the administration of Section 5. See 28 C.F.R. §§ 51.12, 51.13, and 51.14. The examination of a "change" requires a comparison of a "before" and an "after." The question here is, "what is the 'before'?"

two Travis County judgeships both before and after November 1, 1972.[5] Appellants' sole basis for urging this Court's review of the decision below is the fact that general elections to the Travis County judgeships had not yet been conducted as of November 1, 1972, pursuant to the state statute enacted prior to that date. This position is simply without merit, since Section 5 clearly establishes the system in place as of November 1, 1972, as the starting point for comparisons.

B. Prior decisions of this Court recognize that the proper focus is on the system in place on November 1, 1972.

This Court has previously considered, on two occasions, the precise question involved. In *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct., 431, 27 L. Ed.2d 476 (1971), this Court considered a challenge to the changes in the system utilized for election of city aldermen in the City of Canton, Mississippi. Before 1961, the City of Canton elected its aldermen by wards. In 1962, a Mississippi statute mandated that city aldermen be elected by at large elections. After that statute was passed, the Voting Rights Act was enacted, and provided that any change enacted after November 1, 1964, needed to be submitted for preclearance. For unstated reasons, Canton in 1965 ignored the state statute and continued to elect its aldermen by wards. By 1969, Canton had indicated its intention to

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[5] Primary elections for the 200th District Court were scheduled prior to November 1, 1972. The general election for the 200th District Court occurred after November 1, 1972. [App. 91-92].

conduct elections at large pursuant to the state statute. A Section 5 challenge interrupted those plans.

The facts in *Perkins v. Matthews* required this Court to determine what system constituted the proper basis for comparison: whether to look at the **actual** practices of the City as demonstrated in elections of 1961 and 1965, or to look at the practice that **should have been** followed had the City followed the state statute enacted in 1962. In choosing the first alternative, this Court stated that the proper inquiry was to determine what procedure "would have been followed if the election had been held on [November 1, 1964]," 400 U.S. 379, 394, 91 S.Ct. 431, 440. The Court concluded that the procedure used "in fact" as of November 1, 1974, could only be ward elections, based upon the City's actual practice both before and after that date (1961 and 1965 elections) in electing aldermen by wards. 400 U.S. 379, 394, 91 S. Ct. 431, 440.[6]

This analysis in effect created a "hypothetical election" on November 1, 1964, the effective date of the Act as to Canton, Mississippi, and the Court determined the

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[6] Appellants' reliance on *Perkins v. Matthews* is misplaced (Appellant's Jurisdictional Statement, p. 15) because while the date of enactment of the state statute was not regarded as the critical event in that case, it was only so because the actual practice which followed the enactment did not conform to the state statute. If the City of Canton had complied with the 1962 act by conducting at-large elections in 1965, there would have been no "change" in 1969, or in 1965, for that matter, since the statute prescribing at-large elections predated the effective date of the Voting Rights Act of 1965. Canton's *failure to follow* state law in 1965 was the determining factor.

kind of election which would actually have been conducted on that date, given the evidence before it.

Applying that principle to Texas' S.B. 515, it is clear that if such "hypothetical election" had been held on November 1, 1972, based upon the state statute enacted the previous year, it would have been exactly the same system for elections that was actually followed when the judgeships became elected positions under S.B. 515. Since the hypothetical election would have been conducted precisely as the subsequent elections were conducted, there cannot have been a "change" to trigger preclearance under Section 5.[7]

The second case dealing with this issue is that of *City of Lockhart v. United States*, 60 U.S. 125, 103 S. Ct. 998, 74 L. Ed.2d 863 (1983). In that case, the City of Lockhart had used a numbered-post system for some 50 years as a "general-law" city in Texas. After the effective date of the Voting Rights Act as to Texas, the City of Lockhart became a "home rule" city and continued the practice of using numbered-posts to elect city councilmen. The trial court concluded that a general-law city was not entitled under Texas law to use a numbered-post system. Since a home-rule city could use numbered-posts, the trial court found that the institution of a home rule system "legitimized" a previously illegal system, and refused to "reward" the system for past illegal acts. 460 U.S. 125, 132, 103 S. Ct. 998, 1003.

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[7] The court below followed this "hypothetical election" analysis. [App. 5-6]

This Court concluded that the question of whether or not the City of Lockhart should be "rewarded for past illegalities" was irrelevant. The proper comparison under Section 5 did not require an inquiry into municipal powers of a general-law city in Texas. Rather, the inquiry was into the system actually in effect on November 1, 1972, regardless of what the state law might have required. 460 U.S. 125, 132, 103 S. Ct. 998, 1003. The court cited *Perkins v. Matthews*, to reaffirm its view that the comparison must be made with the procedure that would have been followed if an election had been held on November 1, 1972.

The Court's logic in the *Lockhart* case is unassailable:

> "This conclusion was based on the plain reading of [Section 5's] language. It is, moreover, in accord with the Act's underlying policy. Section 5 was intended to halt actual *retrogression* in minority voting strength without regard for the legality under state law of the practices already in effect." (Emphasis added)

460 U.S. 125, 132, 103 S.Ct. 998, 1003. The concept of "retrogression" requires a fixed starting point for a basis of comparison. The system in effect on November 1, 1972, was that fixed starting point. Because that system never changed, there could not be, and there was no, *retrogression*. Similarly, there is no retrogression in the creation of the two new judgeships prior to November 1, 1972.

C. The "Date of Enactment" standard is consistent with Congressional intent.

The legislative history surrounding the extension of the Voting Rights Act in 1975 makes clear that Congress'

objective was prevention of retrogression in minority voting rights. Noting that the Voting Rights Act of 1965 was widely regarded as "the most effective civil rights litigation ever passed," the history shows that the effectiveness of the Act derived from its ability to avoid the "case-by-case litigation" approach required by the earlier voting legislation of 1957, 1960, and 1964. S.REP. NO. 295, 94th Cong. 1st Sess. 11, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 774, 777-778. The House Judiciary Committee report on the 1965 Act noted that up to that time, progress had been "painfully slow." Id. Even when a voting rights victory had occurred, those seeking to resist reform would impose "new ways and means of discriminating." Id.

This Court, in upholding the constitutionality of Section 5 of the 1965 Voting Rights Act, was aware that the thrust of the Act was to prevent maneuvers designed to evade or avoid remedial court orders. The legislative history demonstrates that Congress reaffirmed the objective of preventing retrogression, and that this Court had correctly perceived the objective. The Senate Report quoted with approval this Court's analysis:

> Congress knew that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for discrimination contained in the Act itself. *South Carolina v. Katzenbach,* 383 U.S. 301, 335 (1966).

S.Rep. No. 295, 94th Cong. 1st Sess. *reprinted in* 1975 U.S. Code Cong. & Ad. News 774, 781.

The same legislative history referred to the effective date of the 1975 Voting Rights Act extension. In analyzing Section 204 of Public Law 94-73 (which revised Section 5) the summary states that "the electoral laws and procedures of newly covered jurisdictions [including Texas] are *frozen* as of November 1, 1972." Id. at p. 814, [emphasis added]. It goes on to state that any *"change"* relating to voting in these jurisdictions cannot be enforced unless there is certification by the United States Attorney General or the United States District Court for the District of Columbia that the change is not discriminatory in purpose or effect." Id. This focus on laws and procedures in place as of November 1, 1972, clearly indicates that Congress intended to reach those "changes" which occurred after November 1, 1972.[8] An election system which had already been enacted cannot constitute a *change,* when viewed in that light, since it existed at the time the Act became applicable.

The Congressional objective of Section 5 is to provide a *roadblock* to any scheme enacted to avoid or evade the impact of court orders reducing voting discrimination. Stated another way, the Congress sought to "shift the advantage of time and inertia" by freezing a system in place, thus placing the burden on those who would justify any changes to the existing system. See *South Carolina*

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[8] As the lower court noted [App. 6] the Attorney General has adopted this position, at least implicitly, in interposing objections based solely upon the *enactment* of a bill creating new judgeships. [See also App. 80].

v. Katzenbach, 383 U.S. 301, 328, 86 S.Ct. 803, 818, 15 L.Ed.2d 769 (1966). Viewed in this light, a Texas statute which simply increased the number of judges available to preside over cases in Travis County, Texas, which was enacted four years before the Voting Rights Act was ever extended to apply to Texas, cannot be viewed as a device to avoid or evade, or to suppress minority voting strength. More importantly, however, this legislative history demonstrates that the focus of Congress was on preventing changes which would avoid or minimize voting rights reform, from whatever source. By "freezing" the voting system in place as of November 1, 1972, the Congress drew the line for the starting point for comparison of any subsequent revisions to voting laws or voting practices.

CONCLUSION

As to the Travis County judgeships, this case does not have significant impact because it involves such a narrow spectrum of cases. The legal issues it raises have been previously resolved consistently with the lower court's opinion. It does not frustrate Congressional intent. This Court should dismiss the appeal, or affirm the judgment below, or dismiss and affirm.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASS'N OF TEXAS, *et al.*,
Appellants,

vs.

STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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BRIEF FOR APPELLEE STATE OF TEXAS
(Motion to Dismiss or, alternatively, to Affirm)

Filed pursuant to Rule 18.6 of the Rules of the Court, this brief is a motion to dismiss the United States as a party in this Court, to dismiss the appeal of the private appellants, and to affirm the district court's judgment as to the private appellants Mexican-American Bar Association of Texas, *et al.* ("MABA") . The brief is filed on behalf of the State of Texas ("state" or "Texas"), which was the sole state defendant in MABA's action.[1]

OPINIONS BELOW

The opinion of the three-judge district court is reported at 755 F.Supp. 735 (W.D. Tex. 1990) and reproduced beginning at page 1 of the appendix to MABA's Jurisdictional Statement ("J.S. App."). MABA is partially incorrect in characterizing it as a "2-1 opinion and dissent[.]" MABA Juris. St. 2. The three members of the district court unanimously rejected part of MABA's challenge.

JURISDICTION

The Court does not have jurisdiction over the appeal of the United States, which is neither an appellant nor a party before the Court. *See* Part I, *infra*. The Court also does not have jurisdiction over the appeal of MABA, which lacks standing to invoke

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[1] The Governor and Secretary of State of Texas were named as official-capacity defendants in the action filed by the United States. If the Court accords party status to the United States in this appeal, then this brief is filed on behalf of the Governor and Secretary of State of Texas, too.

the protections of section 5 of the Voting Rights Act. See Part II, *infra*.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to section 5 of the Voting Rights Act, 42 USC 1973c, this case involves several sections from the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, promulgated by the United States Department of Justice ("DOJ") and codified at 28 C.F.R. Part 51 (1990).

§ 51.1(a)(2):

> (a) Section 5 . . . prohibits the enforcement in any [covered] jurisdiction . . . of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until . . . :
>
> . . . .
>
> (2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

§ 51.4(b):

> Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. . . . November 1, 1972.

§ 51.9(a):

The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

§ 51.21:

Changes affecting voting should be submitted as soon as possible after they become final.

§ 51.22:

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment . . .

§ 51.37(a):

If a submission does not satisfy the requirements of § 51.27, the Attorney General may request from the submitting authority any omitted information considered necessary for the evaluation of the submission. The request shall be made by letter and shall be made within the 60-day period . . .

§ 51.39 (a):

When a submitting authority provides documents and written information materially supplementing a submission . . . the 60-day period for the original submission will be calculated from the receipt of the supplementary information . . .

STATEMENT OF THE CASE

Outline of the challenge and its outcome below

This case is about claims that two Texas statutes -- one new and one old -- adding judgeships to the existing Texas district judge system are inoperative because they never were precleared within the meaning of section 5 of the Voting Rights Act. The new statute, S.B. 1379, became Texas law in 1989, and created fifteen new state district judgeships allocated among thirteen counties. The old statute, S.B. 515, became Texas law in 1971, and created two new state district judgeships in Travis County, Texas.

By a two-to-one vote, the district court held that S.B. 1379 had been precleared by operation of law due to the Attorney General's failure to interpose an objection within the applicable 60-day deadline. The district court unanimously held that S.B. 515 was not subject to preclearance because it was enacted before November 1, 1972, the earliest section 5 coverage date for Texas.

Judgeships created by the two statutes

New statute

S.B. 1379 created fifteen judicial districts, sitting as follows:

363rd in Dallas County;
364th in Lubbock County;
365th in Dimmitt, Maverick, and Zavala counties;
366th in Collin County;
367th in Denton County;
368th in Williamson County;

369th in Anderson and Cherokee counties;
370th in Hidalgo County;
371st-376th in Tarrant County; and
377th in Victoria County.

J.S. App. 51a-56a. The Texas House passed it on May 27, 1989, the Texas Senate passed it on May 28, 1989, and the Governor signed it on June 14, 1989.

All the new judgeships except those in Tarrant and Victoria counties became effective on September 1, 1989. Two Tarrant County judgeships, the 371st and the 372nd judicial districts, became effective on September 1, 1990. The Victoria County judgeship became effective upon the occurrence of specified conditions, which had been met before the time of trial.

Four Tarrant County judgeships, the 373rd-376th judicial districts, were to become effective on September 1, 1991, but only upon the occurrence of specified conditions which had not been met by the time of trial. For simplicity, these four judgeships will be termed the "nascent Tarrant County judgeships."

Old statute

S.B. 515 created the 200th and 201st judicial districts, sitting in Travis County. The Texas Senate passed it on May 11, 1971, the Texas House of Representatives passed it on May 29, 1971, the Governor signed it on June 1, 1971, and it became effective 90 days later, on August 30, 1971. J.S. App. 58a. Under the act, the 200th judicial district was to become effective September 1, 1971, and the 201st judicial district was to become effective January 1, 1973. *Id.*, at 57a.

Proceedings below

MABA initiated the lawsuit in late October, 1990, challenging all the judgeships created by S.B. 515 and S.B. 1379, except the four nascent Tarrant County judgeships.[2] It sought an injunction prohibiting further implementation of those statutes until they had been precleared and prohibiting the eleven judges elected to S.B. 1379-created judicial posts from taking office.

Then, only a few minutes before 7:00 p.m. on November 5, 1990, the night before the general election day conclusion to the election for the judgeships (as well as many other state and county offices), the Attorney General, through his Assistant Attorney General for Civil Rights, telecopied a letter to the Texas Secretary of State's office, objecting to creation of the fifteen S.B. 1379 judgeships. J.S. App. 80a-84a. On November 20, 1990, the Attorney General telecopied another letter to Texas, modifying the November 5th objection letter and narrowing the objection to nine judgeships, those being the ones in Dallas, Lubbock, Victoria, and Tarrant counties. J.S. App. 85a-87a.

On November 27, 1990, the United States filed a section 5 action in a different division of the Western District of Texas, challenging the nine S.B. 1379 judgeships to which the Attorney General had objected. It did not challenge the two judgeships created in 1971 by S.B. 515.

On December 4, 1990, the district court ordered consolidation of the MABA and United States actions. J.S. App. 41a. The section 5 aspects

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[2] In addition to the section 5 claim, MABA filed an intentional discrimination claim under the United States Constitution. That claim has been stayed.

of the consolidated cases were tried to the three-judge district court on December 12, 1990.

Decision and issues decided below

At the time the actions were submitted to the district court for decision on the section 5 issues, MABA and the United States had overlapping, but not identical, challenges: (a) only MABA challenged the 200th and 201st judicial districts in Travis County; (b) only the United States challenged the four nascent Tarrant County judgeships; and (c) both challenged five judgeships -- the 363rd in Dallas County, the 364th in Lubbock County, the 377th in Victoria County, and the 371st and 372nd in Tarrant County.

The three-judge district court issued its opinion on December 26, 1990, and its final judgment on the section 5 claims on January 25, 1990. It rejected all claims by both MABA and the United States.

The appeals

MABA filed a timely Amended Notice of Appeal on behalf of the "Mexican American Bar Association (MABA) et al." J.S. App. 95a.[3] It also filed a timely Jurisdictional Statement with the Court to perfect its appeal.

The United States took a different approach. It filed a timely Notice of Appeal, but, before the deadline for its Jurisdictional Statement, moved the district court to dismiss its appeal. The United States did not file a Jurisdictional Statement, but instead filed a "Brief for the United States" under the

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[3] This form of notice makes MABA itself the only appellant in this case. *See infra* 12-13.

docket number of the MABA appeal. On April 9, 1991, the district court entered an order concluding that the United States "has no appeal in the Supreme Court" and that the pending United States motion to dismiss its appeal was moot.

SUMMARY OF ARGUMENT

There is no appellant before the Court with standing to invoke the protections of section 5 of the Voting Rights Act. The United States has abandoned the role of appellant. Additionally, the United States is not a party in the MABA appeal. It was not a party in MABA's action below and, therefore, it is not a party in MABA's appeal here. The fact that the United States was a party in a separate action below which was consolidated with MABA's action does not salvage party status for the United States. Consolidated cases retain their separate existence, and the parties in one do not become parties in the other. This principle was acknowledged by the United States and binds the United States here.

MABA's appeal of the judgment in its action lacks the specificity to give appellant status to any of the seventeen parties who were private plaintiffs below except MABA itself. The notice of appeal specifies only MABA as an appellant and refers to the others with the insufficiently specific "*et al.*"

As the only appellant here, MABA must have standing if there is to be a justiciable case or controversy before the Court. It does not. There was absolutely no evidence about MABA before the trial court. Furthermore, the broad allegations in MABA's complaint about its interests would be insufficient to establish its standing even if they had been proven. The zone of interest sought to be protected by section 5 is the interest of minority

voters, and MABA's allegations do not suggest that it is a minority voters' rights organization.

Thus, there is no case or controversy before the Court. The appeal accordingly should be dismissed.

Even there is a case or controversy before the Court, the questions presented are too insubstantial to warrant the Court's plenary review. Instead, the district court's judgment should be summarily affirmed both as to the new judgeships challenged and the old judgeships challenged.

Covered changes submitted to the Attorney General for preclearance are deemed precleared by operation of law if the Attorney General does not interpose an objection within 60-days, including any appropriate extensions of time. The facts found by the district court demonstrate that, as to the new challenged judgeships, the Attorney General missed his deadlines twice, not just once. Engaging in the fact-intensive consideration of whether the district court clearly erred in so concluding is an insubstantial issue for the Court. The district court properly found that the new judgeships were precleared by operation of law

The old judgeships, created through a Texas law enacted twenty years ago (and a year before the earliest applicable date of section 5 coverage of Texas), simply are not subject to section 5's preclearance requirements. Both the plain language of section 5 and the Attorney General's own formal procedures for administering his section 5 preclearance responsibilities focus on enactment as the key determinative date for coverage. The issue seems clearly established and, even if there were some room for debate, its current importance to the administration of the Voting Rights Act is virtually nil. The issue is not one that is likely to arise again.

ARGUMENT

I.

THE UNITED STATES SHOULD BE DISMISSED BECAUSE IT IS NEITHER AN APPELLANT ON ITS OWN NOR A PARTY IN MABA'S APPEAL

The United States has not perfected its own appeal of the district court's final judgment. It did not comply with the requirements of Rule 18.3 of the Rules of the Court by timely filing a statement as to jurisdiction. Although untimely performance under the rule is not jurisdictional, *see Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 446 n.4 (1974), the fact remains that the United States still is not an appellant here, having abandoned the role. It also is not a party in this case, although the reason is more complex than the reason it is not an appellant.[4]

Rule 18.2 of the Rules of the Court deems all parties "to the proceeding" in the district court to be parties to the appeal. One need not be an appellant

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[4] Why the United States would want to be a party but not an appellant is somewhat perplexing. One possible explanation is that such procedural legerdemain would permit it to remain an active participant in the case without facing potentially adverse consequences flowing from one of the major perils of being an appellant in cases on the Court's appellate docket. The peril is a summary affirmance; the consequence is the binding, albeit limited, authority of such an affirmance. The Court has directed lower courts that summary affirmances are authority for the "specific challenges presented in the statement of jurisdiction" but rejected by the Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Because the United States filed no jurisdictional statement here, *it* technically has presented the Court no issues which might become albatrosses around the United States' neck in future section 5 litigation if the Court summarily affirms the district court judgment -- as Texas urges it to do.

to be a party before the Court. *Diamond v. Charles*, 476 U.S. 54, 63 (1986) (construing and explaining the predecessor to Rule 18.2). This principle, however, does not obviate the need for at least one party to perfect an appeal from the district court. *See, e.g., Id.*, at 63 n.14 (rule "does not provide a means to obtain review in the absence of the filing of a notice of appeal by a proper party").

In this instance, MABA perfected an appeal of its case to the Court; however, MABA's case below was a different one than the United States' case below. Thus, the perfection of MABA's appeal does not constitute the perfection of an appeal from the United States' case below.

MABA's case and the United States' case were separate cases from their inception, filed in different divisions of a federal district. Even though they were consolidated, they remained separate cases from which the perfection of separate appeals was necessary:

> [C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

Johnson v. Manhattan Ry., 289 U.S. 479, 496-97 (1933); *see also Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 735 (1976) (dissenting opinion).

A leading treatise on federal courts concludes that "actions do not lose their separate identity because of consolidation." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2382, at 255 (1977). The United States itself conceded this point when it acknowledged that "[c]onsolidated cases retain their separate identities[.]" U.S. Memorandum in Support of Motion to Consolidate, at 3 n.1 (Nov. 27, 1990).

The United States was the only losing party in *its* action; it was not a party to MABA's action. Its failure to perfect an appeal from the final judgment in its action means that it is before the Court neither as an appellant nor as a party. Thus, it should be dismissed from this action.

A consequence of dismissal of the United States is that the district court judgment is final and binding in its determination about the four nascent Tarrant County judgeships. They have been precleared under the Voting Rights Act, regardless of the Court's disposition of the remainder of the appeal.

II.

MABA'S APPEAL SHOULD BE DISMISSED BECAUSE MABA, THE ONLY APPELLANT, DID NOT ESTABLISH STANDING TO BRING A CHALLENGE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

MABA is the only appellant among the private plaintiffs

While the Court's rule that one may be a party even though one is not an appellant does not impart party status to the United States under the circumstances of this appeal, it conceivably could salvage party status for the sixteen parties who were private plaintiffs with MABA.

The problem, though, is the *Diamond v. Charles* requirement that there me at least one appellant with standing to bring the case to the Court. 476 U.S. at 62-64. Due to the way MABA framed its amended notice of appeal, it is the only appellant. The other sixteen private plaintiffs below are not.

The reason is that the third sentence of Rule 18.1 requires that the notice of appeal "specify the

parties taking the appeal[.]" This requirement parallels the specificity requirement for notices of appeal in Rule 3(c) of the Federal Rules of Appellate Procedure.

Under Rule 3(c), the "*et al.*" designation in a notice of appeal is insufficient to confer jurisdiction over the appeal of a party who is not specifically named. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The language of the specificity requirement of Rule 18.1 being the same, the application of the *Torres* specificity rule is the same in appeals to this Court as it is in appeals to the circuit courts. Thus, MABA, as the only specified appellant, is the only appellant.[5]

MABA lacks standing

With MABA as the only appellant before the Court, *Diamond v. Charles* requires a determination of whether it has presented the Court with a case or controversy to which the sixteen private plaintiffs may be parties. MABA does not present a case or controversy here because, on the facts pleaded and developed below, it lacks standing to lodge a challenge under section 5 of the Voting Rights Act.

MABA's original complaint contained only a one-sentence factual allegation about MABA. It alleged in paragraph 3:

> The MEXICAN AMERICAN BAR ASSOCIATION (MABA) is a state wide organization of attorneys who have a particular interest in the concerns of the

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[5] The Fifth Circuit recognizes an exception to the strict application of Torres when a class has been certified. *See Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989). The exception would be inapplicable here because, though a class had been alleged, none was certified.

> minority population of the State of Texas. Although most of its members are Hispanic, the Mexican American Bar Association is open to all attorneys in the State of Texas.

Texas did not admit this averment in its answer; no evidence was introduced at trial regarding MABA; and the district court made no findings regarding MABA. Thus, MABA has not established standing.

Even were the complaint's allegations taken as true, MABA would lack standing under section 5 of the Voting Rights Act. We may assume for purposes of argument that MABA and its members[6] meet the constitutional standing requirement of injury in fact, *see, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984). The question remains whether MABA meets the statutory standing requirement, which requires it to fall within the zone of interests sought to be protected by the statutory provision whose protection it invokes. *See, e.g., Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3186 (1990).

Section 5 protects the rights of minority voters,[7] not minority lawyers or lawyers with a broad, ill-defined interest in minority concerns. The latter two categories simply do not fall within the zone of interests sought to be protected by the preclearance requirements of section 5.

There is no reported case precisely on point. The closest authority is a court of appeals case which held that an unsuccessful minority candidate lacked

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[6] An organization may have standing on its own or through its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

[7] In his closing argument before the district court, MABA's attorney made the point. "*Section 5 protects the rights of the minority voters.* It does not protect the rights of minority incumbents." Tr. 147 (emphasis added).

standing to bring a challenge under section 2 of the Voting Rights Act to the local voting system under whose auspices he lost a political contest. *See Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989).[8] The basis for the court's holding is that the purpose of the Voting Rights Act is to protect minority voters. *Id.*, at 621.[9]

The principle determinative of *Roberts v. Wamser* is consistent with the Court's application of the principle of statutory standing: requiring a complainant to come within the zone of interests protected by the statutory provision at issue. MABA does not, and, therefore, it lacks standing. Because the only appellant lacks standing, there is no "case" before the Court, and the action should be dismissed.

III.

THE ISSUES ABOUT THE TWO BILLS -- S.B. 1379 AND S.B. 515 -- WHICH ARE PRESENTED FOR REVIEW ARE INSUBSTANTIAL AND DO NOT WARRANT PLENARY REVIEW BY THE COURT

The questions presented are insubstantial and do not warrant plenary review by the Court. Instead,

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[8] *Compare LULAC v. Clements*, 923 F.2d 365, 367 n.1 (5th Cir. 1991) (en banc) (undertaking no analysis of the question in a voting rights context, but imparting defendant-intervenor standing to an incumbent state district judge in her personal capacity and citing the earlier panel decision in the same case, *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989), which had held that incumbent judges have no legally cognizable interest in a voting rights case in their official capacity).

[9] In the proceedings below, Texas relied on *Roberts v. Wamser* to oppose the personal-capacity intervention of several state district judge incumbents as defendants. The district court, with one judge dissenting, cited no authority but granted the personal-capacity interventions. Order of Dec. 4, 1990.

the judgment of the district court should be summarily affirmed both as to the S.B. 1379 judgeships and the S.B. 515 judgeships.

History of judicial preclearance in Texas

The 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, 89 Stat. 400, first brought Texas under section 5's preclearance requirements. November 1, 1972, became the touchstone date. Section 5 required Texas to obtain preclearance for any covered voting matter[10] which it "enact[ed] or [sought] to administer" if it was different from one "in force or effect" on November 1, 1972.

As demonstrated by Texas Exhibit 3, Texas submitted more than 120 new judgeships to the Attorney General for preclearance from the time it came under section 5 coverage until S.B. 1379. The Attorney General never objected; all were precleared.

S.B. 1379 judgeships

First 60-day period

Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's 60-day deadline for interposing an objection was April 16, 1990. Between February 13th and April 16th, the Attorney General made no written request for more information from Texas.

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[10] Major questions about whether the changes challenged here are covered never need to be reached in this case if the district court judgment is affirmed. Among these major questions would be whether section 5 reaches judges, whether section 5 applies to the mere addition of judgeships, and whether any of these legal principles apply retroactively to judgeships created in 1971.

During the same 60-day period, Texas submitted no further material, written information, or documents to the Attorney General other than a telecopy on March 20th of two sections of the Texas Constitution which had been precleared by the Attorney General less than five years earlier.[11] J.S. App. 8a-9a.

Nearly a month later, just nine days before the 60-day deadline, the Attorney General sent Texas a letter announcing that the information effectuated an extension of the objection deadline to May 22, 1990. The letter said nothing about the materiality of the information. J.S. App. 9a. In fact, it did not even specify what the information was.

The district court determined that the telecopied information was not a material supplemental submission extending the 60-day period for the Attorney General to interpose an objection. J.S. App. 10a. The basic reasoning was that the telecopy was of "readily available provisions" to which the Attorney General already had given his section 5 attention.

Second 60-day period

During the second 60-day period, from March 23rd until May 22nd, the Attorney General again did not submit any written requests to Texas for more information. Texas again provided only one document to the Attorney General. On May 16th, Texas requested the Attorney General to consider the Fifth Circuit's decisions in an important section 2 voting rights case. J.S. App. 70a-71a.[12]

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[11] The two provisions, §§ 7 and 7a of article 5, outline basic rules for Texas district judge elections.

[12] The case is *LULAC v. Clements*, now before the Court in the consolidated cases of *Houston Lawyers' Ass'n v. Attorney General*

Three weeks earlier, the Attorney General, through the Assistant Attorney General for Civil Rights (the same official through whom he acted in considering Texas's S.B. 1379 submission, *see* 28 C.F.R. § 51.3), filed a Fifth Circuit amicus curiae brief in *LULAC v. Clements*. The brief, put in evidence below, reflects close familiarity with the LULAC proceedings and record.

Notwithstanding the fact that the Attorney General had been aware of the matter for at least a month and a half, he wrote Texas on May 18th, a scant four days before the already extended deadline, that the objection deadline had become July 16th.

The district court determined that the Texas letter (asking the Attorney General to do no more than pay attention to federal case law developments) was not a material supplemental submission extending the 60-day period for the Attorney General to interpose an objection. J.S. App. 10a. The court reasoned that the letter did not supplement anything, especially given the fact that "DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission." J.S. App. 12a.

Insubstantiality of the factual and legal issues presented to the Court

There is nothing momentous in the district court's finding that S.B. 1379 was precleared by operation of law during either the first or the second 60-day period. It simply measures the facts here against the Attorney General's regulations for administering section 5 and concludes that nothing happened during either period which could

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of Texas, No. 90-813, and *LULAC v. Attorney General of Texas*, No. 90-974.

reasonably be interpreted as warranting the Attorney General's unilateral extensions of time.

The district court's conclusion is precisely in line with the purpose behind section 5's creation of the alternate route of administrative preclearance through the Attorney General. This alternate route is supposed to provide an expeditious avenue of resolution so that states can either get on with the business of implementing their laws or know that they cannot. *Morris v. Gressette*, 432 U.S. 491, 503-04 (1977).[13]

Permitting the Attorney General to use either of the flimsy excuses he used here to drag out the process undercuts the law's purpose in providing the option. Enforcing his own regulations serves the law's purpose. Summarily affirming the district court's S.B. 1379 decision will remove the unnecessary cloud that has hovered for too long over the five remaining challenged judgeships due to the unnecessary and unjustified delays of the Attorney General. That is the only great principle at stake here.[14]

S.B. 515 judgeships

The law creating the two Travis County judgeships was enacted four years before Texas came

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[13] In words that strike a familiar chord here, the court in *Seamon v. Upham*, 536 F.Supp. 931, 937 n.3 (E.D. Tex. 1982 (3-judge court), discusses the Attorney General preclearance route as an expeditious alternative and chastises the Attorney General for "unseemly delay, inattention, and inactivity," as well as for failing to give "careful and detailed analysis" to Texas's submission.

[14] The United States demurely admits its waiver of the principal issue argued in its brief. U.S. Br. 9-10 (citing to part of an opinion by the Court which finds waiver in circumstances similar to those here).

under section 5 coverage and more than a year before the touchstone date of November 1, 1972. It is thus outside section 5's purview.

The very language of section 5 points to enactment as the determinative date for coverage here. Through the phrase "enact or seek to administer," the provision specifically looks to two different types of events -- enactment or the administration of enactments -- and requires their measurement against the situation as of November 1, 1972.

DOJ's formal procedures for administering section 5 also look to enactment as the critical event:

> The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment . . .

28 C.F.R. § 51.22. Another procedural rule stresses the need to submit covered changes "as soon as possible after they become final." 28 C.F.R. § 51.21.

The statutory recognition of these two very different types of events -- enactment and administration -- does not give the Attorney General a choice about which one he will use to measure whether there has been a change requiring preclearance. Instead, he must look to the law (that is, the enactment) first. If it is the same as the one in effect on November 1, 1972, the enactment does not require preclearance. Next, he must look to the administration of the unchanged law, or enactment. If the enactment's administration has changed since November 1, 1972 (through, for example, the movement of polling places), then preclearance of the administrative change is required.

Here, S.B. 515 is the enactment.[15] It was the same on November 1, 1972, as it was the day it was signed by the Governor of Texas. Thus, there was no change requiring preclearance. Furthermore, the administration of the law was the same on November 1, 1972, as it was on the day it was signed by the Governor. The appointive and electoral system for the two judgeships created by S.B. 515 did not change one iota during the period. Thus, there was no change here requiring preclearance.

The principle adopted by the district court is a simple one, furthering the purpose of the Act to have preclearance submissions made as early as practicable, *see* 28 C.F.R. § 51.21 (submit as soon as possible after finality). It also is consistent with the plain language of the Act ("enact or seek to administer"). Finally, it is a principle of little further practical use. The pressing problems of section 5 which require the Court's attention are not the arcana and anomalies of nearly two decades ago. That is precisely what the S.B. 515 question is, and it presents an eminently insubstantial question, unworthy of the Court's plenary review.

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[15] Looking to enactment as the critical date for S.B. 515 is consistent with the Attorney General's preclearance actions concerning S.B. 1379. He evaluated the four nascent Tarrant County judgeships and tried to deny preclearance to them. If something other than enactment were the crucial date, the Attorney General would have had to inform Texas that its submission of those four judgeships was premature. *Cf.* 28 C.F.R. § 51.22(a). His failure to take such action suggests that he thought the matter ripe for preclearance. If it was, then sixteen years ago S.B.515 did not require preclearance and now it does not either.

CONCLUSION

The United States should be dismissed as a party in this appeal. This appeal should be dismissed because the only appellant, MABA, lacks standing to bring it.

If the Court reaches the matter, the judgment of the district court that the S.B. 1379-created judgeships were precleared by operation of law should be affirmed. The judgment that the two S.B. 515-created judgeships were not subject to the preclearance requirements also should be affirmed.

Respectfully submitted,

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April 18, 1991

Supreme Court, U.S.
FILED
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No. 90-1352

In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), et al.,

Appellants,

v.

THE STATE OF TEXAS, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE STATE DISTRICT JUDGE PAUL R. DAVIS, JR.

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QUESTION PRESENTED

Does Section 5 of the Voting Rights Act require preclearance of an elected judgeship created by a statute enacted and implemented in 1971 more than a year before the Voting Rights Act was effectively extended to Texas?

No. 90-1352

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Supreme Court of the United States

October Term, 1990

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Appellants,

v.

THE STATE OF TEXAS, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE STATE DISTRICT JUDGE PAUL R. DAVIS, JR.

Appellee, Honorable Paul R. Davis, Jr., urges that this case presents no issues warranting plenary review and that this appeal should be dismissed or alternatively the judgment of the three-judge court should be affirmed. Judge Davis presently sits as Judge of the 200th District Court of Travis County, Texas and was permitted to intervene below to defend the validity of his judicial post.

STATEMENT OF RELEVANT FACTS

On June 1, 1971, the Texas Legislature enacted S.B. 515, creating the 200th and 201st District Courts of Travis County, Texas. S.B. 515 became effective on August 30, 1971. The 200th District Bench was filled by the appointment of the Honorable Charles Matthews who took office on September 1, 1971. The judicial seat has been continuously occupied since that date, the current incumbent Paul R. Davis, Jr., assumed the office in 1983 following the resignation of Judge Matthews.

The 1975 amendments to the Voting Rights Act extended coverage to Texas for the first time. The statute had a retroactive effect to November 1, 1972. As of November 1, 1972 the 200th District Court had been in existence and functioning for more than one year.

ARGUMENT

SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE CREATION OF THE 200TH DISTRICT COURT OF TRAVIS COUNTY

Section 5 of the Voting Rights Act does not apply to the creation of the 200th District Court of Travis County.

Section 5 of the Voting Rights Act requires Justice Department preclearance "whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972." The State of Texas created the

200th District Court by enactment in 1971 and implemented that enactment in September 1971 by the appointment of the Honorable Charles Matthews to the Court. The Plaintiffs torture the statutory language and its obvious purpose, by attempting to reach back into 1971 and invalidate a Court that has been in operation for almost 20 years.

The United States agrees with our interpretation of the statute. The Government's brief asserts "The other judgeship (District 200), however, was not subject to preclearance because its effective date was before November 1, 1972." (Brief of the U.S. at 22). There is no reasonable interpretation of the Act which could extend its coverage to the creation of the 200th Judicial District Court.

CONCLUSION

The judgment of the District Court should be affirmed with respect to the 200th District Court of Travis County.

Respectfully submitted,

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Supreme Court, U.S.
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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,
APPELLANTS,

v.

THE STATE OF TEXAS, *et al.*,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TEXAS DISTRICT JUDGES FAITH JOHNSON, BRAD UNDERWOOD, AND ROBERT CHESHIRE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the three-judge court correctly determined that the specific pieces of correspondence below did not constitute a material new submission under 28 C.F.R. § 51.39 and thus that the new judicial positions were precleared by operation of law?

2. Whether appellants failed to carry their evidentiary burden of showing that the particular electoral changes below were covered by section 5 of the Voting Rights Act under the facts of this case?

PARTIES

The parties named in Plaintiff's-Appellant's Jurisdictional Statement are correct except for the Defendant Intervenors. They should read as follows:

Defendant Intervenors: Faith Johnson, Brad Underwood, Robert Cheshire, Jerry Dellana, Paul R. Davis, Pete Perez and William E. Burdock.

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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,
APPELLANTS,

v.

THE STATE OF TEXAS, *et al.*,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TEXAS DISTRICT JUDGES FAITH JOHNSON, BRAD UNDERWOOD, AND ROBERT CHESHIRE TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellees Dallas County District Judge Faith Johnson ("Judge Johnson"), Lubbock County District Judge Brad Underwood ("Judge Underwood"), and Victoria County District Judge Robert Cheshire ("Judge Cheshire") (collectively, "Texas District Judges") move this Court to dismiss the appeal filed on behalf of MABA, *et al.*, or in the alternative to affirm that this Court has jurisdiction over this appeal and summarily affirm the decision of the court below. Texas District Judges urge this result because the decision below is so obviously correct as to

warrant no further review, and because this appeal, involving strictly a review of the factual determination of the court below, does not warrant an investment of this Court's time for oral arguments.

STATEMENT OF THE CASE

To the Statement of the Case of the appellants, the Texas District Judges add the following:

The Governor of Texas appointed Judge Johnson to preside over the 363rd Judicial District Court, Dallas County, Texas, on December 12, 1989. She took the oath of office on December 14, 1989, and has presided over the 363rd Judicial District Court, which is a criminal-preference court, since that time. She stood for election to this post on November 6, 1990, and was elected by the people of Texas to serve on the 363rd court.

Judge Underwood was appointed by the Governor of Texas to preside over the 364th Judicial District Court, Lubbock County, Texas, on October 4, 1989. He has presided over the 364th Judicial District Court since he was sworn in on October 16, 1989. Judge Underwood stood for election to this post on November 6, 1990, and was elected by the people of Texas.

Judge Cheshire was sworn in as the presiding judge in the 377th Judicial District Court, Victoria County, Texas, on October 18, 1989. He was appointed to this post by the Governor of Texas on October 3, 1989. Judge Cheshire was elected by the people of Texas to continue to hold this bench on November 6, 1990.

All three of the Texas District Judges hold seats that were created by S.B. 1379. The three-judge court held that S.B. 1379 had been precleared by operation of law.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

This case does not merit plenary consideration by this Court. The three-judge district court resolved the case based on its assessment of the particular facts here, in specific, their assessment of the timing and substance of correspondence between the State of Texas and the Department of Justice. The opinion below does not purport to articulate new legal principles and does not conflict with any other district or circuit court opinion. It simply applies well-established law to the facts of this case.

The United States urged that the case presents a substantial question — whether the Attorney General's determinations of materiality of submissions under section 5 are reviewable. Brief for the United States at 10. However, the United States acknowledges that it did not argue that point below, *id.* at 9-10, it has dismissed its appeal, and the private appellants do not even raise that point.[1] Thus, the only issue before the Court is a fact-specific analysis of correspondence

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[1]The Texas District Judges think such a decision is plainly reviewable since the three-judge court can and must determine whether preclearance was granted. Because the question is not presented to the Court, the Texas District Judges will not belabor the point.

— that certainly can be reviewed by the Court without the aid of oral argument — that will set no precedent and likely will never arise again. Accordingly, plenary consideration is not warranted.

II. THE DISTRICT COURT CORRECTLY HELD THAT CORRESPONDENCE BETWEEN THE DEPARTMENT OF JUSTICE AND THE STATE OF TEXAS DID NOT CONSTITUTE MATERIALLY SUPPLEMENTING SUBMISSIONS

The majority opinion of the three-judge district court correctly held that the judgeships created by S.B. 1379 were precleared by operation of law when the sixty-day preclearance period elapsed without either (1) the interposition of an objection by the Attorney General or (2) the submission of "materially supplementing" information. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 8a. It is undisputed that the State of Texas submitted S.B. 1379 for preclearance on February 13, 1990 . As a result, the sixty-day period elapsed, and S.B. 1379 was precleared by operation of law on April 16, 1990. 28 C.F.R. § 51.1(a)(2)(1990).

At issue are two pieces of correspondence that the State of Texas sent to the Department of Justice ("DOJ"). The first letter contained a copy of a portion of Texas' constitution; the second referenced a case pending in the Fifth Circuit in which the DOJ had participated. The plaintiffs claim that this correspondence extended the sixty-day period. Such correspondence was neither material nor supplementing so as to extend the DOJ's deadline for preclearance under 28 C.F.R. § 51.39(a) beyond April 16, 1990.

As the three-judge court pointed out, the standard for judging whether facts are material is whether they "might affect the outcome . . . under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court reasoned that the sections of the Texas constitution supplied at the DOJ's request by telecopy on March 23, 1990 were not "material" under the *Anderson* definition.[2] To hold otherwise would render the sixty-day period, which serves as a protection from potential DOJ abuses, meaningless.[3]

Even if the telecopy of the sections of the Texas constitution on March 23, 1990, was a material, supplementing submission so as to extend the deadline for preclearance pursuant to 28 C.F.R. § 51.39(a), the extended period expired on May 22, 1990. As the three-judge court reasoned, the letter from the state of Texas dated May 16, 1990, advising the DOJ of the pendency of the *en banc* decision in the *LULAC* case — a case in which the DOJ was actively participating as an amicus — was not a material, supplementing submission. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 11-12a. This letter obviously did not affect the

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[2]Nor, for the same reasons, did these sections of the Texas constitution supplement the submission of S.B. 1379. Further, the DOJ did not request the sections of the Texas constitution properly in writing as required by the regulations under the Voting Rights Act at 28 C.F.R. § 51.37(a). *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 10-11a.

[3]Unchecked by judicial standards, conceivably, the DOJ would argue that requesting copies of pages from a dictionary would extend its deadline.

outcome of the DOJ's consideration of Texas' submission, as required by the *Anderson* definition of material.[4]

Thus, the time period for preclearance of S.B. 1379 expired at the latest on May 22, 1990. Because the Attorney General made no objection to S.B. 1379 until November 5, 1990, the bill had been precleared by operation of law.

III. NEITHER THE GOVERNMENT NOR THE PRIVATE PLAINTIFFS MET THEIR REQUIRED BURDEN OF PROOF

This case should be summarily affirmed for the additional reason that plaintiffs wholly failed to introduce any evidence on a required element of their claim: whether section 5 applies to the change in question. In a three-judge action to enjoin enforcement of an allegedly unprecleared change, the court addresses three questions: (1) does section 5 cover the change; (2) has the Attorney General precleared the change; and (3) what relief is appropriate. *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). Appellants have simply assumed that section 5 applied and failed to introduce any of the evidence needed to assess that issue under these facts. Absent

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[4]The Attorney General's actions make clear that the pendency of *LULAC* was not material. When he made his tardy objection to S.B. 1379, he refused to follow it. In the face of the *en banc* panel of the Fifth Circuit declaring that Texas' system did not violate section 2, he declared that it did, and based his refusal to preclear on such claimed violation. Moreover, advising the DOJ of the decision could hardly be called a supplement, because the DOJ was involved in the *LULAC* litigation and must have been aware of the pending *en banc* decision. Again, would the DOJ be allowed to argue an extension of time if a political subdivision wrote and requested it to be aware of its duties under section 5?

any proof on an element of appellants' cause of action, judgment was properly entered against them.

The appellants argued that the addition of the three seats held by the Texas District Judges are covered by section 5 pursuant to this Court's summary affirmance of *Brooks v. State Board of Elections*, No. CV-288-146 (S.D. Ga. Dec. 1, 1989), *aff'd*, 111 S.Ct. 288 (1990). *Brooks*, however, must be limited to its particular facts because it only was summarily affirmed. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 388-89 n.15 (1975). *Brooks* did *not* broadly hold that all electoral changes relating to judges were covered by section 5; to the contrary, *Brooks* used a fact-specific analysis to determine whether the addition of judges to an existing, valid system is covered by section 5.

Brooks correctly cites *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32 (1978), as authority for determining whether a proposed change in voting practices falls within section 5's coverage. The standard is whether the change "has a potential for discrimination." *Id.* at 42. The *Brooks* court very carefully set out the proper analysis for when the additional of an additional seat to an at-large system would have such potential:

> Where only one judge is to be elected in a circuit, anti-single-short provisions can have no potential for discrimination. If another judicial post is added, however, such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign. Adding a post to a multi-judge circuit could have the same effect. Depending upon the percentage of minority voters and the cohesiveness of their voting, and a successful

> single-shot voting campaign may be highly improbable until there are three or more available posts in the circuit. If a single-shot campaign, although unavailing when only two posts are available, would be successful in a three-post race, then the addition of that third post alters the effect of the anti-single-shot provisions in that district.

Brooks, slip op. at 7.

In accordance with this instruction, a three-judge court cannot simply assume that section 5 applies to the three benches upon which the Texas District Judges sit. The addition of a bench in Dallas, Lubbock, and Victoria counties must be examined on a county by county basis. *Before section 5 is implicated, there must be evidence that the addition of the bench itself is what triggers the potential for discrimination.*[5]

Judge Johnson's bench is the 37th in Dallas County; Judge Underwood's is the sixth in Lubbock County; and Judge Cheshire's is the fourth in Victoria County. Appellants would have to prove that the incremental increase in benches — rather than the existing system — has the potential for discriminatory effects. Given the *LULAC* decision, the validity of the existing system is clear.[6] *League of United*

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[5]The court in *Brooks* demonstrated how the addition of seats to an existing judicial district may actually improve the chances of a minority voting group to elect their chosen candidate. *Brooks*, slip op. at 7 n. 15.

[6]As the majority opinion in the three-judge court noted, the holding of the Fifth Circuit in *LULAC*, absent further ruling from the this Court, establishes that section 2 does not apply to the election of judges in the Fifth Circuit. Yet, despite this plain ruling, the Attorney General based his letter of objection in this case on the ground that the at-large election of judges in Texas violates section 2. As the court below notes, "[t]his position reflects a disturbing disregard for the rule of law" on the part of

(continued on next page)

Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted*, 111 S. Ct. 775 (1991). Appellants could not show that, for example, the addition of a 37th at-large bench in Dallas increases in any way any form of discriminatory effect not already extant in the prior 36 at-large benches in Dallas County. Absent such a showing — in which the appellants would bear the burden of proof — appellants cannot show the applicability of section 5. Because appellants failed to offer such proof below, judgment was properly entered against them.[7]

CONCLUSION

For the foregoing reasons, the appeal docketed by MABA, *et al.* should be dismissed, or in the alternative, this Court should affirm that it has jurisdiction over this appeal and summarily affirm the decision of the court below.

(continued from previous page)
the Attorney General. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 13-14a.

[7]Following the clear precedent of the *LULAC* decision, another three-judge panel within the Fifth Circuit has recently held that section 5 does not apply to the addition of new at-large judges to an existing judicial structure within set geographical boundaries. *Hunter v. City of Monroe*, 757 F. Supp. 25 (W.D. La. 1990), *petition for cert. filed*, 59 U.S.L.W. 3527 (U.S. Jan. 23, 1991)(No. 90-1187). It is possible that the Court's consideration of this appeal may be simplified by its decision in *Clark v. Roemer*, 751 F.Supp. 586, 5922 (W.D. La. 1990), *probable juris. noted*, 111 S. Ct. 775 (1991) (preclearance of statute creating ultimate number of judicial seats constitutes preclearance of all judicial seats necessary to reach that ultimate number).

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No. 90-1352

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In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,

Appellants,

v.

THE STATE OF TEXAS, *et al.*

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLANTS' REPLY TO BRIEF FOR APPELLEE STATE OF TEXAS ON THEIR MOTION TO DIMISS

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No. 90-1352

In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,

Appellants,

v.

THE STATE OF TEXAS, *et al.*

Appellees

On Appeal From The United States District Court For The Western District Of Texas

APPELLANTS' REPLY TO BRIEF FOR APPELLEE STATE OF TEXAS ON THEIR MOTION TO DISMISS

ARGUMENT

Appellee State of Texas raises into question the standing of appellant to bring this appeal. They claim that the notice of appeal filed by the appellant was defective in that there is no mention of any individual as an appellant and that the Mexican American Bar Association (MABA) has no standing to appeal. The Appellants reply as follows:

1. The notices of appeal mention that an appeal is brought on behalf of Plaintiff Christina Moreno, who is a minority voter. In the Plaintiffs' Notice of Appeal and the Plaintiffs' Amended Notice of Appeal (see pages 43 and 96 of the Appendix to the Jurisdictional Statement filed by the Appellants) it is clear that the appeal is brought by the Texas Rural Legal Aid on behalf of Christina Moreno. Her name is specifically mentioned in the notices of appeal. For this reason, *Diamond v. Charles*, 476 U.S. 54 (1986) and *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the cases relied upon by the appellees, do not apply to this case.

2. To the extent that Christina Moreno has standing for this appeal, the Court does not need to concern itself with whether or not The Mexican American Bar Association (MABA) has standing. Nevertheless, in our view, MABA does have standing. Organizations have standing to represent the interests of their membership, see, e.g. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The MABA membership, as minority attorneys, is comprised of Mexican American eligible voters, the object of the protections afforded by the Voting Rights Act. Also, when this lawsuit was filed, Texas was conducting elections for state district judges pursuant to election changes that had not been precleared by the U.S. Department of Justice as required by federal law. Such elections are clearly illegal. MABA, as an organization of Mexican American attorneys, clearly has an interest in having state district judges elected in a manner that complies with the Voting Rights Act.

CONCLUSION

For the above reasons, the Appellees' Motion to Dismiss should be denied.

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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1352

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

The State of Texas, as appellee, suggests that the appeal should be dismissed because appellants lack standing (Br. 12-15) and that, in any event, the United States should be dismissed (*id.* at 10-12). The State's submission is premised on misapprehensions regarding the procedural posture of this case and the status of appellants and of the United States. The State's suggestions that the appeal be dismissed, and that the United States be dismissed, should be rejected.

1. The State's contention that the Mexican American Bar Association (MABA) "is the only appellant among the private plaintiffs" (Br. 12) is incorrect. We believe that private plaintiffs' notice of appeal is effective as to all the private plaintiffs, and that

Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), cited by the State (Br. 13), is distinguishable.[1] Here, unlike in *Torres*, it is clear that all private plaintiffs sought to appeal. That intention is manifested by the names of all counsel for the private plaintiffs on the notice of appeal, and by the description of "Mexican American Bar Association (MABA) et al." as the "Plaintiffs-Appellants" taking the appeal. J.A. 95.[2] By contrast, in *Torres*, the notice of appeal used the term "et al." but also listed 15 of the 16 plaintiffs. In those circumstances, the use of "et al." could have reasonably been read to apply to all of the named plaintiffs, but not to the one plaintiff specifically omitted. In addition, since private plaintiffs seek declaratory and injunctive relief with respect to the State's failure to obtain preclearance of legislation in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, their claims, unlike those in *Torres*, are undifferentiated and the dis-

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[1] In *Torres*, plaintiffs were intervenors in an employment discrimination case. Their notice of appeal of the district court's judgment inadvertently listed the names of only 15 of the 16 plaintiffs. 487 U.S. at 313, 317. The Court held that Fed. R. App. P. 3(c), which states that a notice of appeal "shall specify the party or parties taking the appeal," is jurisdictional and that the failure to name a party in the notice of appeal "constitutes a failure of that party to appeal." 487 U.S. at 314.

Although the instant case involves an appeal to the Supreme Court, and not to a court of appeals, the Supreme Court Rules contain a provision substantially identical to the Federal Rule of Appellate Procedure at issue in *Torres*. See Sup. Ct. R. 18.1 (in a direct appeal from the district court, "[t]he notice of appeal shall specify the parties taking the appeal").

[2] MABA is the first plaintiff listed in the private plaintiffs' complaint. See MABA Complaint para. 3.

trict court's adverse decision is indivisible.[3] In these circumstances, reference to the "Plaintiffs-Appellants" and the use of "et al." should be effective as to all private plaintiffs. All of the private plaintiffs will be equally affected by a favorable or unfavorable decision on appeal, and thus the concern in *Torres* that the appellee and the court have notice of which plaintiffs will be bound by an adverse judgment (487 U.S. at 317-318) is not present here. Similarly, since the sole issues in the appeal are whether the State's 1989 legislation was precleared by operation of law and whether the Travis County judgeships required preclearance, the notice of appeal affords the State full notice of the consequences of a decision favorable to appellants.[4]

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[3] Private plaintiffs include MABA, three other associations, and 13 individuals who are registered voters in various counties in Texas. See MABA Complaint paras. 3-18. The notice of appeal explicitly refers to one of the private plaintiffs. See J.S. App. 96 (notice of appeal signed by "Attorney for Christina Moreno"). We note, however, that Ms. Moreno is identified in the complaint as "qualified to vote for district judges in Midland County" (MABA Complaint para. 6), and the judgeships at issue are in Dallas, Lubbock, Tarrant, and Victoria Counties (with respect to the 1989 legislation) and in Travis County. Cf. note 4, *infra*.

[4] See generally *National Center for Immigrants' Rights, Inc.* v. *INS*, 892 F.2d 814, 816 (9th Cir. 1989) (regarding appellate jurisdiction and notice of appeal), decided on the merits, 913 F.2d 1350 (9th Cir. 1990), cert. granted, No. 90-1090 (Apr. 1, 1991). But see, *e.g.*, *Minority Employees of the Tennessee Dep't of Employment Security, Inc.* v. *Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir.) (en banc), cert. denied, 111 S. Ct. 210 (1990).

Because the notice of appeal is effective as to all private plaintiffs and because at least some of the private plaintiffs unquestionably have standing (*e.g.*, Joan Ervin (para. 8),

2. With respect to the status of the United States, the State is similarly incorrect. The State begins by attacking a straw man. The State maintains that the United States is not an appellant. Br. 10. We agree, and we have not contended to the contrary. As we explained in our brief (at 9-10), we did not file our own jurisdictional statement because we had not raised in the district court an issue of overriding significance to one of the questions presented—the nonreviewability of the Attorney General's discretionary determination that submission of additional information materially supplements a jurisdiction's original submission and thereby recommences the Attorney General's 60-day review period.[5] Instead, we filed as an appellee in support of appellants. See Sup. Ct. R. 18.2 ("All parties to the proceeding in the district court shall be deemed parties to the appeal.").[6] The State's reliance (Br. 10-11) on *Diamond* v. *Charles*, 476 U.S. 54 (1986), is therefore also misplaced. Indeed, *Diamond* supports our status as an appellee because it confirms the settled rule of this Court that "a party below * * * remains a party here." *Id.* at 63.

3. The State further suggests that the United States should be dismissed as a party because the

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Volma Overton (para. 11), Mary Ellen Hicks (para. 17)), it is not necessary for this Court to consider whether MABA itself also has standing. See *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

[5] Although the State speculates about possible ulterior motivations for our decision not to file a jurisdictional statement (Br. 10 n.4), these speculations are unfounded and incorrect. As noted, our brief forthrightly states our reason for not filing a jurisdictional statement. See Gov't Br. 9-10.

[6] With respect to one part of one issue, we disagree with appellants. See Gov't Br. 22-23.

United States' complaint and the appellants' complaint were consolidated below, and thus, according to the State, the United States is not a party in appellants' appeal of the district court's judgment. State Br. 11-12. This suggestion is erroneous. This Court's Rules provide that "[a]ll parties *to the proceeding in the district court* shall be deemed parties to the appeal." Sup. Ct. R. 18.2 (emphasis added).[7] There can be no question that the United States was a "part[y] to the proceeding in the district court." The district court consolidated the two actions; held a single hearing, with all parties fully participating; issued a single decision; and *issued a single judgment.* See J.S. App. 1, 41, 93; Gov't Br. 7-9 & 10 n.13.[8] The State's suggestion that the United States may not be considered a "part[y] to the proceeding in the district court"—even though the very judgment that binds the United States is at issue in the appeal—is thus clearly mistaken.[9] Indeed, in the

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[7] See also Sup. Ct. Rule 12.4 (on petition for a writ of certiorari, "[a]ll parties *to the proceeding* in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.") (emphasis added).

[8] The fact that only a single judgment was issued makes it especially clear that the United States is a party. This Court's Rules envision that parties to a single judgment are parties to an appeal of that judgment. See Sup. Ct. R. 18.2 (parties interested jointly, severally, or otherwise in *the judgment* may appeal separately; or any two or more may join in an appeal") (emphasis added).

[9] The State seeks to rely (Br. 11-12) on a supposed general rule about the effects of consolidation. The authorities cited by the State, however, do not involve a construction of this Court's Rules (and the procedural context presented by an appeal to this Court from a single judgment in consolidated cases). Compare Sup. Ct. R. 18.2 (parties to the proceeding

Voting Rights Act context itself, the United States has previously participated in this Court, as an appellee in support of appellants, in an appeal by private appellants from a single district court judgment concerning consolidated cases. See Brief of the United States, *Blanding* v. *DuBose*, No. 81-325 at 2 n.2; *Blanding* v. *DuBose*, 454 U.S. 393 (1982). See also *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 266 n.2 (1984) ("Two other taxpayers * * * were appellants in the consolidated suit in the Hawaii Supreme Court. They did not appeal to this Court and thus are appellees here pursuant to [the predecessor to Rule 18.2].").

Accordingly, the State's motion to dismiss the appeal and to dismiss the United States should be denied.[10]

Respectfully submitted,

KENNETH W. STARR
Solicitor General

MAY 1991

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in the district court are parties to the appeal in this Court) with *Torres* v. *Oakland Scavenger Co.*, *supra* (under Federal Rules of Appellate Procedure, party who did not prevail in the district court is not a party in the court of appeals unless that party is included in a notice of appeal).

[10] We agree with the State that the four "nascent Tarrant County judgeships" are not before this Court (see State Br. 12), although not for all of the reasons that the State suggests. Those judgeships are not before the court because appellants did not challenge them. Indeed, even though the United States did challenge those judgeships, the district court apparently believed that those judgeships were not before it because "the statutory conditions necessary to bring them into existence have not been met." J.S. App. 7 n.1.

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No. 90-1552

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorneys for petitioners has been obtained, but the attorneys for respondent have refused to consent.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in inter-

pretations of the antitrust laws that adversely affect competition.

This case involves the appropriate standards for summary judgment in antitrust cases. The issues raised are of particular importance to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether their strategies may prompt suits by competitors or customers, and thus result in excessive litigation costs. A critical issue is whether unmeritorious suits, if filed, can be resolved on summary judgment without trial.

The attached brief focuses on two of the errors in the opinion of the United States Court of Appeals for the Ninth Circuit: (1) the determination that ambiguous evidence may defeat a summary judgment motion, which permits juries to reach verdicts on the basis of pure speculation; and (2) the requirement that businesses show "significant procompetitive conduct" in order to obtain summary judgment, which has no basis in any statute or rule, and establishes courts as mini-regulators. This amicus brief does not just restate the arguments in the Petition for Writ of Certiorari or focus on the specific facts of this case. Rather, the brief discusses aspects of the issues which are not addressed in the Petition and which have far-reaching practical consequences for all business organizations.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1552

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in interpretations of the law that adversely affect competition.

This case presents the issue of when summary judgment must be granted in an antitrust case. The opinion of the United States Court of Appeals for the Ninth Circuit replaces the summary judgment standards articulated by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), with new standards that permit plaintiffs to go to trial on the basis of purely ambiguous evidence unless the defendant can prove that such a trial would deter "significant pro-competitive conduct." This ruling is of particular concern to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether those strategies may prompt litigation and what the costs of litigation might be.

The Roundtable subscribes to the criticisms of the opinion below that are contained in the Petition for Writ of Certiorari. This amicus brief will discuss the deficiencies in the opinion from a somewhat different perspective, and will emphasize the broad adverse consequences of the standards invented by the Ninth Circuit panel.

First, the panel's opinion stated that *Matsushita* cannot really mean what it says. The court said that if "a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible . . . that decision would lead to a dramatic judicial encroachment on the province of the jury."[1] The court below apparently believed that it had to rescue this Court from the consequences of an inadvertent error in *Matsushita*.

The lower court is wrong. The precise language of *Matsushita* is consistent with traditional Supreme Court authority. The principle that a plaintiff cannot proceed

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[1] Appendix A to Petition for Writ of Certiorari at 8a-9a (hereinafter "App. A").

to trial on the basis of evidence that gives equal support to two conflicting inferences was clearly expressed in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933); it was applied in the antitrust context in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968); and it was definitively explained in *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita*.

This first mistake in the opinion below is directly responsible for another serious mistake. Because the Ninth Circuit panel was mistakenly concerned about what appeared to be an intrusion on the jury's function if *Matsushita* were read literally, it read *Matsushita* to require a further balancing test before summary judgment may be granted: namely, whether "an inference of antitrust conspiracy from circumstantial evidence . . . would have the effect of deterring significant procompetitive conduct."[2] This summary-judgment test is wrong, not only because it nowhere appears in *Matsushita*, but also because it actually creates an entirely new rule of substantive antitrust law. Under the antitrust laws, conduct either is or is not an unreasonable restraint of trade. The court below suggests in effect that there is a third category of conduct, which is not an unreasonable restraint but nonetheless is also not sufficiently procompetitive for courts to be concerned about the chilling effect of jury speculations. There are no standards in the statute or in decided law to circumscribe this putative third category.

The decision below would require a trial court *at the summary judgment stage* to engage in a full-blown and unbounded inquiry into whether certain practices are or are not "procompetitive." This is an extraordinary requirement to be embodied in a decision that purports to be concerned about too much judicial fact-finding! If

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[2] *Id.* at 11a.

allowed to stand, the decision will, of course, also undercut everything that *Matsushita* tried to accomplish. Under *Matsushita*, judges have a critical responsibility to screen out meritless litigation. The Ninth Circuit's opinion would undermine the court's responsibility to determine whether a reasonable juror could find for the plaintiff, not only on motions for summary judgment but also on motions for directed verdict or judgment j.n.o.v.

For these reasons, the decision below could have consequences that extend far beyond the specific case in issue and adversely affect the administration of justice.

I. THE DECISION BELOW WOULD PERMIT A JURY TO FIND A CONSPIRACY ON THE BASIS OF AMBIGUOUS EVIDENCE THAT IS EQUALLY CONSISTENT WITH COMPETITION.

In *Matsushita*, this Court addressed the types of evidence sufficient to establish a "genuine issue of material fact" that would require trial and thus enable a nonmovant to avoid entry of summary judgment.[3] In particular, the Court focused on whether inferences from ambiguous circumstantial evidence could establish a "genuine" issue of fact. The Court found that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 antitrust case," 475 U.S. at 588, and reiterated its prior holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*, *citing Monsanto Co. v. Spray-*

[3] In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court decided that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, once a movant has established the absence of a genuine issue of material fact, the burden shifts to the non-movant to demonstrate the existence of such a fact.

Rite Service Corp., 465 U.S. 752, 764 (1984). The Court specifically held:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." [475 U.S. at 588.]

The opinion of the Ninth Circuit panel states that this Court's *Matsushita* opinion does not mean what it says: "We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible."[4] The principal reason given for the refusal to apply the language of *Matsushita* is that the language, taken literally, "would lead to a dramatic judicial encroachment on the province of the jury."[5] To avoid this apparent difficulty, the opinion constructed an entirely new summary judgment standard:

> In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior.[6]

Under this novel standard, the burden is no longer on plaintiffs to produce evidence that "tends to exclude" the possibility of independent action, but rather is on

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[4] App. A at 8a-9a.

[5] *Id.* at 9a.

[6] *Id.* at 13a-14a. We assume that the phrase "beneficial procompetitive behavior" means the same thing as "significant procompetitive conduct," which appears earlier in the opinion, *id.* at 11a.

defendants to show that the challenged conduct is "pro-competitive."[7] This is a serious distortion of the *Matsushita* decision.

Matsushita reaffirmed *Monsanto*'s holding that it is not "reasonable" to draw an inference of conspiracy where evidence is equally consistent with competition and conspiracy. Where the evidence is equally consistent with either ultimate fact—competition or conspiracy—a jury would have no basis on which to decide which inference was more likely than not. To permit a conspiracy inference in those circumstances would basically permit a jury to reach a verdict based on the collective guesses of its members. It would essentially be the same as permitting a jury to reach a verdict on the basis of no evidence at all.

The classic articulation of this problem appears in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933), an accident case in which the evidence equally supported two inconsistent explanations for the accident. This Court held:

> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover. [288 U.S. at 339.][8]

Before the decisions in *Matsushita*, *Celotex*, and *Liberty Lobby*, there was much discussion among courts and com-

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[7] The Ninth Circuit is alone among the Courts of Appeals in its burden-shifting requirements. *See generally* DeSanti & Kovacic, Matsushita: *Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 626-628 (1991) and cases cited therein.

[8] This case arose in the context of a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), has clarified that the same analysis applies to both directed verdict and summary judgment issues.

mentators about the continued viability of this articulation.[9] A significant cause of the confusion was a series of cases under the Federal Employers' Liability Act and the Jones Act in which this Court seemingly renounced (without overruling) the *Pennsylvania Railroad* standard and adopted the view that the jury must resolve all competing inferences.[10]

Whatever the merits of these cases, it is clear that *Matsushita* applied the *Pennsylvania Railroad* standard for antitrust cases (even though the case was not cited).[11]

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[9] In 1951, Professor James reported the "usual" test to determine a "legitimate" inference as: "where from the facts most favorable to the plaintiff the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture and a jury will not be permitted to draw it." James, *Proof of the Breach in Negligence Cases (including Res Ipsa Loquitur)*, 37 Va. L. Rev. 179, 185-186 (1951). Professors Wright and Miller subsequently reported that, although courts articulated this test, "it may be that the purported test overstates the quantum of proof required," and that courts recognized "that if the evidence might reasonably lead to either of two inferences it is for the jury to choose between them." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2528 (1971) (footnote omitted). Professor Cooper similarly concluded that federal courts had shifted away from the "more useful approach" of *Pennsylvania Railroad* in favor of the view that juries should select among competing inferences. Cooper, *Directions for Directed Verdicts: A Compass for the Federal Courts*, 55 Minn. L. Rev. 903, 957 (1971).

[10] *See* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2526. This Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962), an antitrust case, also has been read to support such a view.

[11] Similarly, in *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968), this Court held that a refusal to deal that was equally consistent with independent action as with conspiracy was insufficient evidence to require trial. *Id.* at 280, 286-290. In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), the Court also found that conduct equally consistent with competition and conspiracy would not require trial; rather, evidence that "tends to exclude" the possibility of independent action is required.

Under this standard, there is a subtle distinction between situations where juries should be permitted to choose between competing inferences and situations where they should not. The question is whether the evidence provides a basis on which a jury could make a rational choice between inferences. As explained by one commentator, Dean Friedenthal: "It is only when a trier of fact could reasonably choose between inferences that summary judgment should be denied. In some situations it is clear without question that no rational choice is possible." [12]

Dean Friedenthal posits two examples to explain the difference between circumstances in which the evidence is sufficient for a jury determination and those in which it is not. In one example, there are separate pieces of undisputed evidence that each give rise to different and inconsistent inferences.[13] In these circumstances, *each piece of evidence* "tends to exclude" the possibility of a contrary inference. The inferences are therefore competing, and the jury should be permitted to decide which inference is more probable than not. In the other example, *the only evidence* that exists is such that it is impossible to determine which inference is "more likely than not." [14] In these circumstances, "[o]ne could argue

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[12] J. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standard?*, 63 Notre Dame L. Rev. 770, 785 (1988).

[13] The example involves a person who must take one pill per day to remain alive, but will die if two pills per day are taken. The person is found dead with clear evidence that two pills have been taken. The issue is whether this was an accident, implying substantial insurance recovery, or suicide, implying much less insurance recovery. One item of undisputed evidence is that the person substantially revised his will just hours before death; another is that, around the same time, he made plans with friends for a trip the next day. *Id.* at 786.

[14] That example involves a two-car accident in which the evidence is clear that one of the drivers went through a red light, but the absence of eye witnesses or survivors makes it impossible to determine which driver was at fault. *Id.* at 785.

that this is not a case of competing inferences at all; it is really a situation in which there can be no inference." [15]

Many Courts of Appeals other than the Ninth Circuit have implicitly recognized this distinction and have decided cases accordingly. Thus, where each individual piece of evidence could give rise to an inference of either conspiracy or independent action, courts have generally upheld summary judgment and refused to permit juries to speculate.[16] Evidence of "parallel pricing," for example, is equally consistent with perfect competition or perfect collusion, and courts do not permit an inference of conspiracy if this is all there is. The opinion in *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) (Kennedy, J.), provides another instructive illustration. Summary judgment was sustained when the same piece of evidence could give rise to three different inferences, but the jury would have no basis on which to choose among those inferences other than by speculation. 810 F.2d at 903-904.

By contrast, where separate pieces of evidence each give rise to one reasonable inference and the inferences to be drawn are inconsistent, courts typically have permitted juries to resolve the issue. In these cases, juries are implicitly selecting the pieces of *evidence* that are most significant, which is what juries do all the time.[17] They are not, however, engaging in pure speculation about competing inferences that are equally probable.[18]

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[15] *Id.* at 785.

[16] DeSanti & Kovacic, *supra* note 7, at 619-626 and cases cited therein.

[17] When juries do this, of course, they are deciding cases on the basis of circumstantial evidence. The opinion below is wrong when it suggests that a literal reading of *Matsushita* would require plaintiffs to prove conspiracies by direct evidence. *See* App. A at 10a.

[18] *See, e.g., Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988); DeSanti & Kovacic, *supra* note 7,

The *Matsushita* standards therefore do not encourage courts to invade the jury's function; they rather provide guidance for the performance of a function that must be performed by the court: namely, the assessment of whether a "genuine issue of material fact" exists for trial, which means "whether an inference adverse to the moving party is sufficiently plausible that it could reasonably be drawn by a jury." [19] Thus, the Ninth Circuit panel erred when it rejected the plain language of *Matsushita* on the ground that it impermissibly interfered with matters appropriately left to the jury.

Certiorari is appropriate here to clarify the reasons why the *Matsushita* standards for summary judgment do not invade the jury's function, not only to correct the erroneous decision below, but also to avoid further distortions of the *Matsushita* opinion by other courts that similarly do not understand it.

II. THE DECISION BELOW IMPOSES AN UNPRECEDENTED SUMMARY JUDGMENT STANDARD WITH NO LEGAL CONTENT.

The opinion below requires antitrust defendants seeking summary judgment to demonstrate that "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." [20] Neither the Sherman Act nor Federal Rule of Civil Procedure 56 nor prior case law provides any authority for this requirement. In addition, the requirement has no legal

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at 627-628, 633-634 ("Ninth Circuit panel has strayed even farther from the *Matsushita* and *Celotex* standard. * * * This Ninth Circuit reading of *Matsushita* conflicts with other circuits' opinions applying *Matsushita*.").

[19] Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487 (1984). Judge Schwarzer proposes several considerations for courts to assess in making this determination. *Id.* at 487-488.

[20] App. A at 13a.

content because section 1 of the Sherman Act does not distinguish between independent conduct that is "procompetitive" and any other form of independent business behavior.

The opinion below explicitly acknowledges that this new requirement would compel a court to "consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement." [21] This means, that *before they could decide a summary judgment motion*, courts would be forced to conduct a regulatory kind of proceeding and decide what legal conduct is sufficiently worthy to be protected against the chilling effect of speculative jury verdicts. It is simply incredible that the Ninth Circuit panel, ostensibly concerned about judicial fact-finding, would invent such a fact-bound summary judgment test.

A. The Ninth Circuit's New Requirement Has No Legal Foundation.

Section 1 of the Sherman Act prohibits concerted action in "restraint of trade." Since all agreements restrain trade to some degree, the courts have added the gloss that a challenged restraint must be "unreasonable" to be illegal.[22] The statute therefore authorizes courts and juries to determine: (1) whether business conduct is concerted or independent, and (2) if concerted, whether it is reasonable or unreasonable. It does not create a third category of conduct that is independent and reasonable but competitively unimportant. In particular, the statute does not suggest that courts should take more care to protect "significantly procompetitive conduct" against mistaken inferences of illegality than they take to protect other kinds of lawful conduct.

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[21] *Id.* at 11a.

[22] *E.g., Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

Nor does case law under the Sherman Act support such a suggestion. *Matsushita*, on which the Ninth Circuit panel purports to rely for the origin of its new requirement, repeats the *Monsanto* caution that "courts should not permit factfinders to infer conspiracies when such inferences are *implausible*, because the effect of such practices is *often* to deter procompetitive conduct." 475 U.S. at 593, *citing Monsanto*, 465 U.S. at 762-764; emphasis added. This caution, like the rule limiting permissible inferences based on ambiguous evidence, implements the policy against jury verdicts based on unreasonable inferences. The Court did not say, however, that juries *could* rely on implausible inferences if specially procompetitive conduct were not at issue.

Indeed, the lone authority supporting the Ninth Circuit opinion's new requirement appears to be a Stanford Law Review note that describes *Matsushita* as "ambiguous" and possibly "dangerously overbroad."[23] The Note argues that the permissibility of an inference from circumstantial evidence should be evaluated on the basis of whether the inference would have an undesired deterrent effect. "In such a situation, the judge must decide whether the innocent behavior that will be deterred is important enough that further proof will be required in order to avoid this undesired effect."[24] The Note asserts that "[t]his determination will be guided by the governing substantive law."[25] But, neither antitrust law nor the Federal Rules of Civil Procedure specify how courts should assess whether business conduct is sufficiently procompetitive to qualify for the application of summary judgment standards under Rule 56.

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[23] Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stan. L. Rev. 491, 492, 507-512 (1988).

[24] *Id.* at 511.

[25] *Id.* at 511; footnote omitted.

B. Summary Judgment Rules Should Apply Equally to All Claims of Conspiracy Based on Ambiguous Evidence.

Matsushita's expressed concern about the chilling effects of mistaken conspiracy inferences on procompetitive conduct does not establish the opposite proposition that there should be no concern about the effects of mistaken inferences on competitively neutral conduct. Yet this is precisely the position taken by the Ninth Circuit panel: if significantly procompetitive behavior (determined by some unspecified standard) is not involved, then an antitrust plaintiff may avoid summary judgment and go to trial simply on the basis of ambiguous circumstantial evidence.

Apart from the complete absence of any authority for such a test, there are other practical problems with it. Courts (or juries) can never know with certainty all of the competitive effects of any business practice. As Judge Easterbrook has explained:

> In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no 'right' balance between cooperation and competition. The judge has no benchmark. Small wonder that the history of antitrust is filled with decisions that now seem blunders.
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> • • • •
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> Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust.[26]

Given these limitations, it makes no sense to build such fact-driven and uncertain determinations into a summary judgment standard. A defendant, in effect, would

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[26] F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3, 4 (1984).

have to prevail in a regulatory proceeding in order to establish the right to a summary disposition.

Another antitrust scholar makes a similar point. Robert Bork has argued that "in all cases in which behavior is neutral or in which analysis does not provide a basis for predicting effects upon consumer welfare, tie-breaking considerations indicate that the law should not intervene." [27] Professor Bork bases this judgment in part on the insight that courts are not likely to be able to identify conduct that truly is competitively neutral: "If the deadweight loss [of consumer welfare] and efficiency are not in fact equally balanced, then the conduct is either beneficial or detrimental[,]" and not something in between.[28] If even theoretically there is no place for the third category of conduct that the Ninth Circuit has created, courts and litigants should not be put to extraordinary burdens in order to find it.

The Ninth Circuit's opinion treats Rule 56 as inapplicable to any antitrust defendant whose conduct is not viewed as "significantly procompetitive" by the court. In *Celotex*, however, this Court admonished that "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." 477 U.S. at 327.

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[27] BORK, THE ANTITRUST PARADOX 117, 133 (1978). If the law should not intervene to prohibit conduct, it also should not inhibit conduct by a refusal to apply ordinary summary judgment standards.

[28] *Id.* at 133.

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CONCLUSION

This Court's opinion in *Matsushita* was well grounded in precedent and did not sanction an invasion of jury prerogatives. A piece of evidence from which two equally plausible inferences may be drawn cannot support a jury verdict for the party with the burden of proof. It is no better than no evidence at all.

Matsushita does not need to be rescued by the Ninth Circuit, which reads things into the Court's opinion that are not there in order to avoid imaginary difficulties. Moreover, the additional requirements that the Ninth Circuit would impose on defendants seeking summary judgment have no legal content. A requirement that courts evaluate the degree to which conduct is competitively useful in the context of a summary judgment motion would add yet another layer of unbounded scrutiny to the already difficult task of applying the Sherman Act.

The Business Roundtable, as *amicus curiae*, asks the Court to accept this case for review in order to reverse the opinion below.

Respectfully submitted,

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